SUBJECT INDEX

PETITION FOR WRIT OF CERTIORARI:

	PAGE
Opinion Below	2
Statute Involved	3
Jurisdiction	3
Summary Statement of Matter Involved	4
Questions Presented	13
Reasons Relied on for Allowance of Writ	14
Transcript Annexed	15
Supporting Brief	15
Prayer	15

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI:

Two Separable Schemes	17
Evidence of Collateral Matters	34
Conclusion	53

AUTHORITIES CITED

	PAGE
Beck vs. U. S. (8 Cir.) 33 Fed. (2) 107-111	34
Criminal Code, Sec. 215; Title 18, U.S.C.A. 338	3
Belt vs. U. S., 73 Fed. (2) 888	26, 27, 32, 34
Hass vs. U. S., 93 Fed. (2) 427	29
Kidwell vs. U. S., 38 App. D. C. 566	29
Leche vs. U. S., 118 Fed. (2) 246	26
Livezey vs. U. S., 279 Fed. 496	27
Morris vs. U. S., 112 Fed. (2) 522	26
Sconyers vs. U. S., 54 Fed. (2) 68	26, 27
Sunderland vs. U. S., 19 Fed. (2) 202	26, 28
U. S. vs. Blakeman, 251 Fed. 306	28
U. S. vs. Buckner, 108 Fed. (2nd) 921	29
U. S. vs. Dembowski, 252 Fed. 894	28
U. S. vs. Patty, 2 Fed. 664	29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No.

LEON CHARLES WEISS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition of Leon Charles Weiss for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in Support Thereof.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, LEON CHARLES WEISS, a citizen of the United States, domiciled in the State of Louisiana, respectfully brings this, his application for a writ of certiorari, to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this criminal case.

OPINION BELOW

Petitioner was convicted on October 26th, 1940, in the District Court of the United States for the Western District of Louisiana, Monroe Division, of violating the Mail Fraud Statute (section 215, Criminal Code; 18 U.S.C.A., 338). He was found guilty on the first three counts of a nine-count indictment. Sentence was imposed on October 31st, 1940, petitioner being condemned to serve the maximum imprisonment under the statute of five (5) years in the United States Penitentiary, at Atlanta, Georgia, on the first count of the indictment; and on the second and third counts, it was ordered that the imposition of sentence be suspended, and probation granted on the usual terms and conditions. Petitioner thereupon took his appeal to the United States Circuit Court of Appeals for the Fifth Circuit, where judgment was rendered affirming his conviction on June 9th, 1941, Judge Sibley dissenting from the majority opinion by Judge Holmes, with Judge McCord (see opinion and dissenting opinion, Tr. Vol. II, page 1232; 120 F. (2d) 472, advance sheets of July 21st, 1941). Petitioner, within the delays allowed by law, and on June 30th, 1941, filed his petition for a rehearing in the said United States Circuit Court of Appeals for the Fifth Circuit (see Tr. Vol. II, page 1240), which petition for rehearing was denied on September 11th, 1940, with written opinion (see Tr. Vol. II, page 1244; not yet published in reporter advance sheets). On September 12th, 1941, a stay of mandate was ordered by the said United States Circuit Court of Appeals for the Fifth Circuit, for a period of thirty (30) days, exclusive of Sundays and holidays, from September 11th, 1941, to enable petitioner to apply to this Honorable Court for a writ of certiorari to review said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit (Tr. Vol. II, page 1281).

STATUTE INVOLVED

The statute under which defendant was convicted (section 215, Criminal Code; Title 18, U.S.C.A. 338) reads in its pertinent provisions, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the Post Office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both." (R.S. Sec. 5480; Mar. 2, 1889, c. 393, Sec. 1, 25 Stat. 873; Mar. 4, 1909, c. 321, Sec. 215, 35 Stat. 1130).

JURISDICTION

Jurisdiction of this Honorable Court is invoked under paragraph (a) of Section 240 of the Judicial Code as amended (section 347, Title 28, U.S.C.A.), making it competent for this Court to review by certiorari any case, civil or criminal, in a circuit court of appeals; and the application is made within 30 days after entry of judg-

ment (denial of rehearing), as required by Rule XI of this Honorable Court, promulgated May 7, 1934, and in the manner required by Rule 38 of this Honorable Court.

SUMMARY STATEMENT OF MATTER INVOLVED

The petitioner, Leon Charles Weiss, and one Monte E. Hart, were jointly indicted on nine counts, the first eight for substantive offenses of separate mailings in execution of an alleged scheme to defraud, and the ninth count for conspiracy between Weiss and Hart to commit the same offenses against the United States. The co-defendant, Hart, committed suicide about a month before the case came on for hearing, and Weiss was tried alone.

At the time of the matters referred to in the trial, the petitioner, Leon Charles Weiss, was senior partner in a firm of architects of New Orleans, known as Weiss, Dreyfous & Seiferth. Included in work on public buildings in Louisiana in 1936, and nearby years, which these architects did, was construction at Louisiana Polytechnic Institute at the town of Ruston, State Normal College at Natchitoches, and for Louisiana State University both on the campus at Baton Rouge and in the medical center on the Charity Hospital grounds at New Orleans.

At this time, the defendant Monte E. Hart was a member of the general contracting firm of Caldwell Bros. & Hart, also of New Orleans, which firm was performing much public construction work in Louisiana, including work at the institutions named in the immediately preceding paragraph on which Weiss, Dreyfous & Seiferth were architects.

This indictment grew out of the construction by Caldwell Bros. & Hart between May, 1936, and March, 1937, of a building at Louisiana Polytechnic Institute at Rus-

ton, La., on which Weiss, Dreyfous & Seiferth of New Orleans and Neild, Somdal & Neild of Shreveport were associate architects.

The gist of the joint charge against Hart, since deceased, as a member of the contracting firm, and Weiss, as a member of the associate architects, was that in connection with this building job at Louisiana Polytechnic Institute they devised a scheme to fraudulently obtain $56,914.42, and made or caused certain uses of the United States mails in execution thereof.

The government's theory of this claimed fraud divides it into two elements (to which the defense has objected as actually charging in each count of one indictment, and simultaneously trying the accused for, two separate and dissimilar schemes, if any there existed), and it will suffice to introduce the point by saying here that the $56,914.42 mentioned in the indictment was supposed to have been obtained by Hart and Weiss in two methods: (1) the sum of $27,000.00 was alleged to have been the result of increasing by that amount, in May, 1936, the job price over the actual bid price of Hart's firm, when Weiss, as architect, prepared the contract for signature; and (2) a whole year later in May, 1937, they were alleged to have obtained another amount of $29,056.04, under an architects' final certificate in which Hart presented a claim for value of extra work that the government contended exceeded by that amount the fair value thereof.

In other words, there was an alleged device by which $27,000.00 was added to the cost of the job before it even began, in May, 1936, when the building contract was signed. There is no doubt that this increase took place. The petitioner Weiss, who personally would have stood to gain only a pittance from architects' fees by the price

increase, claimed that he enlarged the price at the then governor's instruction, believing in good faith that the chief executive of the State had reasonable ground for allowing the increase to the contractor as well as authority for doing so, since the governor was obtaining the money for the badly needed school building (to replace a fire loss), in fact, furnishing much of it out of a fund under the governor's discretionary control. As will be seen, this particular alleged fraud, said to have been participated in by petitioner Weiss at one time and one place, presented an issue of whether or not the governor of the State had authorized certain action, and if so, whether Weiss acted reasonably in relying on such authorization.

This propounded an entirely different juror's problem from the other alleged device, at another time and another place, by which Weiss was accused of participating in the obtaining of the other amount of $29,056.04. At the time the contract was signed at the increased price, under the claimed governor's authorization, in May, 1936, the building, of course, had not even begun. There was no regular work yet undertaken, much less any extra work. This so-called extra work by the contractors came chiefly toward the end of the job. It is clear from the testimony that the accused Weiss never visited Ruston, nearly 300 miles from his own office, during the construction period, actual supervision being left to Neild, Somdal & Neild, the associate architects, from nearby Shreveport. The first apparent connection of Weiss with the inflated charge for "extras" was at New Orleans, and not before the end of March, 1937, and possibly as late as about May 17th, 1937, when Hart, according to the testimony of Hart's own bookkeeper, deliberately drew a padded extra bill, included it in his final claim for the job, and delivered it to Weiss as customary basis for the final

architects' certificate on the job. Like the fact of the increase of the contract price in 1936, there is no doubt of the fact of the excessive charge by Hart for the extras in 1937. The defense for Weiss did not attempt, on his trial, to combat the excessive character of Hart's charges for these extras. It was obvious from the testimony of Hart's own bookkeeper that his padding of these figures by Hart had been flagrant and deliberate. The contention of Weiss was only that he had no knowledge of the actual extent of the extras performed on the job, that he believed the bill for these extras had been approved by the architects' superintendent on the job; that, moreover he (Weiss) thought Hart was honest and trusted him, and that his issuance of the final architects' certificate, with inclusion of Hart's excessive charges for extras, had not been as participation by him in any fraudulent scheme, but had, at the worst, been the result of carelessness, caused chiefly by his misplaced confidence in Hart's honesty and partly by pressure of other extensive work he was carrying on at the same time.

It is correct that both of the issues of alleged fraud in the case, first the motive with which Weiss participated in the enlargement of the contract price by $27,000.00 in 1936, and secondly his connection with the padding by $29,056.04 of Hart's bill for extras in 1937, were questions of fact which the jurors ordinarily would have settled by their verdict. Our complaint is, however, that mixed and confused issues of fact were presented to the jurors, under each count; that Weiss was tried, on each count, for one questionable transaction at Baton Rouge in May, 1936, and simultaneously for another questionable transaction at New Orleans in May, 1937, each event being disconnected, proved by different facts and witnesses, and there being absolutely no proof of a continuity of alleged fraudulent conduct on the part of the

accused Weiss from one year to the other which might support an assumption that both transactions were items in one fraudulent plan, as urged by the prosecution and charged by the court.

It is also correct that in a mail fraud case the use of the mails is the gist of the offense. Nevertheless, the use of the mails must be "for the purpose of executing" a fraudulent scheme. Hence the existence of a scheme is the base rock of the case; and, in practical effect, since the evidence of mailing is usually unambiguous, what the jurors are really called upon to decide in such a trial is whether the accused was involved in a fraud.

To place before the same jurors two separate instances of alleged fraud, remote in time and place, unlike in plan or device, depending on independent proof and susceptible of very different inferences on veracity of witnesses, probabilities of error by negligence, etc., is to afford some of the jurors the opportunity to decide for the accused on one accusation of fraudulent practice and against him on the other, and the rest of the jurors vice versa, so that unanimity of decision in the jury box exists on neither horn of the defendant's dilemma, yet his conviction stands accomplished by the mere duplicity of the indictment.

We can understand such a practice being countenanced in cases where the alleged frauds are substantially of the same pattern, so that a conclusion of guilt as to one incident reasonably justifies the same conclusion as to all. Such are the cases of bogus stock sales to many persons, each sale of the same pattern, one merely a repetition of the other, except possibly for the different identity of victim in each instance. In the case at bar the practice was extended beyond the bounds of fair trial, by the submission of two unlike issues of fraud before the same jury.

We address ourselves, in this extremity of the petitioner's case, and in the legal situation we have outlined, particularly to Count 1 of the indictment, the first of the only three counts on which he has been convicted, and the only count on which sentence was actually imposed. What we have already summarized is not only true, we believe, in abstract principle, but under Count 1 it creates a very practical error in the case, arising from the following facts:

Each of the first eight counts of the indictment (the ninth was for conspiracy) charged the mailing jointly by the deceased Hart and the defendant Weiss of a letter in execution of the alleged fraud (the indictment assuming the 1936 enlargement of the contract price and the 1937 padding of the bill for extras to be one single scheme to defraud). The eight letters related generally to the collection of compensation by either the contractors, Caldwell Bros. & Hart, or the architects, Weiss, Dreyfous & Seiferth, and we need now refer only to the letter under Count 1. This was a letter from Weiss, Dreyfous & Seiferth, petitioner's firm at New Orleans, delivered to Louisiana Polytechnic Institute at Ruston, La., on March 3rd, 1937, transmitting to the school (for whom the building was being erected) what was known as architects' Certificate No. 3 for installment of architects' fees on account in the sum of $3,000.00.

This letter of March 3rd, 1937, was alleged in Count 1 of the indictment to have been for the purpose of executing an alleged single scheme to defraud embracing both the contract price enlargement in 1936 and the padded bill for extras in 1937. The trial judge charged the jury (Tr. Vol. II, page 1158) that the scope of the indictment embraced one single scheme to defraud.

Let us consider the sequence of dates to determine

whether, under Count 1, such an allegation of the indictment was duplicity and whether the charge of the court was error. The enlargement of the contract price took place in May, 1936. The mailing complained of in Count 1 was on March 3rd, 1937. The false bill for extras was not even conceived by Hart until about the end of March, 1937 (testimony of his bookkeeper, Seybold, Tr. Vol. II, pages 695-702), and it may not have been called to the attention of Weiss until as late as about May 17th, 1937, the date of issuance by the architects of the final contractors' certificate which embraced Hart's false claim. How could the mailing by Weiss, Dreyfous & Seiferth on March 3rd, 1937, to collect an installment of architects' fees, be allowed to be involved before a jury as being in execution, not only of the alleged pre-existing scheme, but also of a scheme which the government had no proof came into existence, even in the mind of the accomplice Hart, much less Weiss himself, prior to the end of March, 1937?

Glaringly loose pleading resulted in the framing of Count 1 to charge that a letter of March 3rd, 1937, was mailed and delivered in execution of a fraudulent claim not in existence before the end of March, 1937. Having overruled preliminary pleadings attacking this count for duplicity, the trial judge maintained his view despite the evidence (Seybold, government witness, Tr. Vol. II, pages 695-702) that the later scheme to pad the extras was born **after the said letter was mailed,** and instructed the jury that the whole transaction was one scheme to defraud. The Court of Appeals for the Fifth Circuit has supported this view, but its holding seems in direct conflict with the dceision of the Court of Appeals for the Second Circuit in a parallel situation in *U. S. vs. Buckner* (the Philippine bond swindle case), 108 Fed. (2d) 921.

In addition to the duplicity of the indictment, and particularly Count 1 thereof, and the erroneous position taken thereon by the trial judge in his charge, after the evidence had shown the mailing under Count 1 was intermediate in point of time between the two alleged methods of fraud, the defense has complained of the extent to which so-called "system" or "intent" evidence, of collateral matters, was allowed in the Weiss trial. This error by the trial judge was the grounds of the dissent by his Honor, Judge Sibley (dissenting opinion, Tr. Vol. II, page 1238).

As we explained at the opening of this summary statement, in addition to the building at Louisiana Polytechnic Institute at Ruston, La., which was mentioned in the instant indictment, Weiss, Dreyfous & Seiferth had been architects, and Caldwell Bros. & Hart had been contractors, on various other public jobs, at Louisiana State Normal at Natchitoches, La., and for Louisiana State University both on the campus and Baton Rouge and in its medical center on the New Orleans Charity Hospital grounds. The relations between Weiss and Hart in their work at these other institutions were drawn on most liberally by the prosecution, through proof of collateral matters, during the trial relating to the Louisiana Polytechnic Institute building. Conceding the right of the government, where Weiss had pleaded, as he did, innocence of criminal intent in enlarging the contract price on the Louisiana Polytechnic Institute building, and negligence in approving the false bill for extras on same, to off-set his plea by showing his participation in similar happenings elsewhere, we still insist, and one member of the Circuit Court of Appeals has agreed with us, that the District Attorney was permitted to go far beyond the legitimate bounds of such character of evidence, to the great prejudice of Weiss before his jury.

The most conspicuous error of this nature was the admission of a certain $75,000.00 check, belonging to James M. Smith, the deposed and notorious president of Louisiana State University. This check had nothing to do with anything else in the case, and in no manner shed any light on the intent of Weiss, either in what he was alleged to have done at Louisiana Polytechnic Institute or even under the proof of collateral matters at Louisiana State University or elsewhere. This check for such a large amount had no place in the case on trial except to link Weiss up with the discredited Smith in some unexplained money transaction so as to enable the District Attorney to argue to the jurors that Weiss had gotten this $75,000.00 from the head of an institution which was being defrauded, and thus prejudice Weiss heavily before the jury. Not only was this far-fetched evidence admitted, the check for this large amount tendered to and handled by jurors (who were all of moderate means), but the positive argument was made to the jury by the District Attorney **that Weiss had gotten this $75,000.00 from Smith.**

As we will show more in detail in our supporting brief, this check was pulled out of the District Attorney's bag of tricks at the eleventh hour of the trial, 300 miles away from New Orleans where the check had been handled. Neither Weiss nor his counsel had any knowledge of the real disposition by Smith of the money represented by the check, and they had no time or opportunity then for investigation. Weiss was crucified by the District Attorney's argument that Weiss had been the recipient of this large sum of money from the notorious Smith, who at the time of the Weiss trial was serving a penitentiary sentence for his own frauds.

The Weiss trial ended on a Saturday night at Monroe, La. On Monday morning, when the banks and bus-

iness houses of New Orleans opened, we traced the $75,000.00 check. The truth was disclosed. Weiss had never received one penny from Smith. The total amount of the check had been spent by Smith in stock gambling with a prominent national brokerage house. The accusation against Weiss made before the jury by the District Attorney on the previous Saturday had been unjust. The check had been admitted to the jury on a wholly erroneous assumption by the trial judge.

Weiss immediately filed a motion for a new trial, and recited the record evidence of the disposition of the $75,000.00 which had been discovered by his attorneys and was available. This new trial was refused, and the actions of the trial judge with reference to this $75,000.00 check have been approved by the Circuit Court of Appeals, with the dissent noted.

QUESTIONS PRESENTED

The case presents two questions, either of which should warrant the issuance of a writ to review the proceedings below:

1.—The indictment (and particularly Count 1 thereof, on which petitioner has been sentenced to five years in the penitentiary) was duplicitous, in that it charged petitioner, in each count, with participation in two separable alleged frauds; that the mailing charged in Count 1 ante-dated, and could not have been in execution of, the later and subsequent alleged fraud; that in defiance of the government's only evidence as to the time of origin of the later alleged fraud, showing its subsequent conception in the mind of petitioner's alleged accomplice to have been **after** the mailing by petitioner of the letter described in Count 1, the trial judge still charged the jury that there was only one scheme to defraud involved

in the case; and the confused issues of alleged fraudulent conduct before and alleged fraudulent conduct after the time of the mailing in Count 1 were thus left to the jury.

2.—That, under the theory of "system" or "intent" evidence, proof of collateral matters was admitted before the jury which exceeded legitimate bounds of such evidence; particularly in the case of the admission of a certain $75,000.00 check connected with Dr. James M. Smith, former president of Louisiana State University, which should not have been admitted against petitioner at all; but which, as admitted, was allowed on a false predicate of fact, assumed by the trial judge and argued by the district attorney, and immediately after the trial, by newly discovered evidence, was indisputably disclosed to have been false and erroneous; and yet a new trial to remedy this gross injustice to petitioner has been refused.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The reasons relied on for the allowance of a writ of certiorari are:

1.—That the constitutional and statutory rights of the petitioner Weiss have been infringed by conviction and sentence for using, or causing to be used, the mails in execution of a scheme to defraud, where two alleged schemes, separable in time, place, plan, characteristics, details, and proof, were pleaded in the indictment as one single scheme and charged by the trial judge to the jury to have been one single scheme, and the different issues of the two separable and unlike transactions were determined by a jury simultaneously without assurance of unanimity of decision on either alleged fraud; and the inconsistency of holding between the Circuit Court of Appeals for the Fifth Circuit in the instant case and the

Circuit Court of Appeals for the Second Circuit in the *Buckner* case (108 F. (2d) 921) should be resolved.

2.—That the constitutional and statutory rights of the petitioner Weiss have been infringed by conviction and sentence under the conditions and circumstances described in this petition and the supporting brief, where irrelevant and grossly prejudicial proof of other matters not connected with the main case, or even fair "system" or "intent" evidence, has been admitted to the jury, and argued vehemently to the jury, on an assumption which was later revealed to have been wholly false; and yet a new trial has been denied Weiss despite the available record of the obvious falsity of what was allowed to be shown against him before his jury.

TRANSCRIPT ANNEXED

The record having been printed for the use of the court below (Rule 38, paragraph 7), and the necessary copies so printed being furnished, your petitioner has filed herewith the copies of said record as printed below, together with the proceedings and opinion in the Honorable Circuit Court of Appeals for the Fifth Circuit, and due certificate thereon of the Clerk of said Court.

SUPPORTING BRIEF

Petitioner also files herewith and makes part of this application his brief in support thereof.

PRAYER

WHEREFORE, petitioner Leon Charles Weiss respectfully prays that a writ of certiorari may issue to the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be

reviewed and determined by this Court; and that the judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be in due course reversed and set aside, and that judgment may be rendered in favor of petitioner, setting aside his conviction and sentence pronounced below, and discharging him forthwith; and petitioner prays for all further and necessary orders proper in the premises, and for all such relief as the nature of the case may justify.

HUGH M. WILKINSON,
JOHN D. LAMBERT,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

We will deal with the two errors complained of in our preceding petition separately, and endeavor to be as direct and concise as possible, in accordance with paragraph 2 of Rule 38 of this Court. The question, of course, of whether there were two separable alleged schemes to defraud, as we contend, or only one continuing scheme, as the trial judge charged the jury, necessitates some reference to the facts; and our complaint of the admission of improper so-called "intent" evidence requires us to review that evidence; and we will do these things as briefly as possible, but ask your Honors to remember the trial was a somewhat lengthy one and bear with us in this application accordingly.

TWO SEPARABLE SCHEMES

It is necessary to show at least a skeleton of the facts of the contract price increase of 1936, and the padded extra bill of 1937, to show the remoteness, as far as Weiss was concerned, at any rate, between the two events, in point of time, place, plan and details.

On January 6, 1936, the building in question at Louisiana Polytechnic Institute burned. The college had no money to replace this building. Like the school itself, the State Board of Education did not have any money to replace the building, and, pending such time as the Legislature would meet, the school was dependent upon the Governor to obtain any money for this purpose. About two weeks after the building burned, Richard W. Leche was nominated for the governorship of Louisiana for the four-year term to begin the following May. This is the

same Governor Leche during whose administration, in 1939, the recent notorious scandals in Louisiana public life were disclosed, and who is himself now under conviction, pending appeal to this Court, for mail fraud.

Before Governor Leche took office, the State Board of Education received bids to construct this building, and Caldwell Bros. & Hart were low with a bid of $264,-482.13. The Board awarded the contract at this price, and all bids were tabulated by the architects and copies of the tabulation placed on file in the Board's office at Baton Rouge and published in full in the Board's customary printed bulletin.

The minutes of the meeting, at which the bids were opened, recited that the governor would poll the members of the Legislature for permission to obtain the necessary funds, and Mr. Caldwell, the member of the contracting firm who was present, said it would be satisfactory to hold the bid open until the members of the Legislature were heard from. Between this action of the Board on April 4, 1936, and until the Legislature met in regular session on May 11, 1936, no steps were taken to poll the members of the Legislature for any funds to carry out the proposal to construct this building. Even after Leche became governor on May 12, 1936, and the Louisiana Legislature sat in regular session from May 11th until June 9, 1936, no measure was ever introduced, at the instigation of the governor or anybody else, to obtain an appropriation for any money to construct this building at Louisiana Polytechnic Institute.

According to the testimony of petitioner Weiss, on May 20, 1936, eight days after Leche became governor, the former co-defendant Hart visited Weiss in the latter's office in New Orleans and informed him that he, Hart, had seen Governor Leche; that Governor Leche was ready

to go ahead with the building, but would not be able to raise the money for some time and wanted the contractors to support the expenses of the job in the meanwhile; that for this Governor Leche had agreed to pay the contractors $27,000.00 additional, which was still lower than the next lowest bid, and that the governor wanted Mr. Weiss to draw the contract accordingly. Weiss immediately telephoned Governor Leche in Baton Rouge and obtained an appointment to see him next day. He told the governor on this visit that he had drawn the contract in accordance with what Hart had told him, and had brought it to Baton Rouge with him, but that he did not desire to release the contract at the increased price until he had confirmed from the governor personally that the instructions conveyed by Mr. Hart were correct. The further testimony of Weiss was that Governor Leche told him it was correct that he had agreed to pay the contractors the additional amount of $27,000.00, assigning a number of reasons for the larger price; and accordingly Weiss drew and released the contract at a price of $291,482.13.

Subsequently the contractors did carry the total cost burden of the job from May until October, 1936, Governor Leche finally beginning to pay their estimates, through a State Board of Liquidation loan, and allocations from a special fund for public building purposes under his discretionary control, in the latter month.

On the trial of Weiss, Governor Leche was called as a witness in rebuttal by the government and denied any knowledge of the enlargement of the contract price. His testimony was given long after he had resigned as governor and shortly after his own conviction for mail fraud in connection with the purchase of highway department trucks.

We have, though briefly, reviewed the foregoing

facts of what Weiss claims occurred in May, 1936, for the purpose of showing your Honors what the jury had to decide about this portion of the case, and how different it was from what the jury had to decide regarding events in the following year. We venture to say that the explanation of the increase in the contract price in 1936 which was made on the witness stand by Weiss was, in the light of all the surrounding facts and circumstances, a reasonable one, and, but for the denial of the incident by Governor Leche himself, might well have satisfied the jury that Weiss had been justified in thinking that Governor Leche not only had legitimate reasons, but possessed legal authority, to order the upping of the said contract price. In other words, the issue on this branch of the case was largely a question of which jurors believed that Weiss was telling the truth, and which jurors believed that Leche was telling the truth.

The issue before the jury on the other branch of the case was vastly different. Here was a question of whether, in approving Hart's inflated bill for extras at the tail end of the job, Weiss had acted knowingly and corruptly, or had issued the final certificate in the excessive amount through ignorance and negligence. Furthermore, there was nothing to show any continuity or fraudulent conduct on the part of Weiss between May, 1936, and May, 1937, to warrant an assumption of any participation by him **in a single scheme** to generally defraud the school.

On this branch of the case the surrounding facts and circumstances again supported the explanation given by Weiss. He had never had anything to do with the actual supervision of construction on the ground, which had been left to the associate architects in Shreveport. He had never even visited the scene during construction. His office had no accurate records of extras on the job.

He signed a final certificate on the strength of a bill for extras prepared by Hart, and at a time when he (Weiss) was very busily engaged, working day and night, preparing the plans for the huge new Charity Hospital building at New Orleans, since constructed.

Hart, having induced Governor Leche in May, 1936, according to the testimony of Weiss, to grant his firm a price increase of $27,000.00, a whole year later (according to the testimony of Hart's bookkeeper Seybold) sat down one day and drew up a final bill which included extras on the job, the value of which he deliberately inflated by over $29,000.00. There is no evidence in the record to show, nor from which it might even be assumed, that what Hart did about the end of March, 1937 (as Seybold fixed the time), was a continuing episode in a fraud which he and Leche, or he and Weiss, had begun to perpetrate in May, 1936. Even as to Hart, what he did at the later time might have been an entirely new and original thought, a scheme not devised, even in his own mind, before the time he sat down with his bookkeeper Seybold and gave it effect by writing out the false bill for extras. It is proportionately even more remote that in such a negative state of the record, Weiss should be charged as an accomplice all through the year to a plan not devised by the chief actor, Hart, until about the end of March, 1937, and possibly not even known in any wise to Weiss until as late as May 17, 1937, the date of issuance by the architects of the contractors' final certificate.

What we are trying to bring out in sharp focus is that under our foregoing outline of both branches of the alleged fraud there existed two separate and dissimilar factual situations. It was not as though Hart and Weiss were selling bogus stock through the mails, and having

sold one share to Black and another share to White, it would be obvious to any juror that if one deal was fraudulent the other was bound to be. That could be reasonably accepted as a single scheme. The same material proof, the same issue, would be before the jury. A finding of guilt would necessarily imply that all twelve jurors had found that, in the opinion of each, the defendant was guilty of the same fraud which all of them had in mind when they voted their verdict.

But in the case at bar the jurors faced two problems simultaneously. They knew that letters had been mailed which related to the work of Hart's firm and Weiss' firm at Ruston. They had to find **unanimously,** however, that each of those letters was in execution of a fraudulent scheme on the part of Weiss. Let us say that jurors 1 to 6 believed Weiss against Governor Leche in the event of 1936, and felt that Weiss had acted in good faith in the $27,000.00 contract price increase, but they concluded that Weiss had conspired with Hart in 1937 to pad the extras in the final estimate. Jurors 7 to 12, on the other hand, thought Weiss had been merely negligent in what he did about the final certificate in 1937, but that he had lied about Governor Leche's authorization to increase the contract price in 1936.

The trial judge having told them it was all one single scheme to defraud, and letters having obviously been mailed, jurors 1 to 12 vote for conviction, and it is apparently a unanimous verdict. And yet, in basic result, Weiss has been tried at the same time and by the same jury for two different, separable and distinguishable alleged fraudulent devices, between which two devices the minds of jurors (as to defendant's guilt or innocence) may have actually disagreed, less than the necessary legal number finding him guilty on one device, and less than

the necessary legal number finding him guilty on the other device, thus only **seeming** to agree on the face of the verdict as returned.

It is not fair to contrast the case at bar with the common, the most common example, of a bogus stock swindle to numerous victims through the mails. There the identical nature of the sales is a justification of the extension of the rule of single offense counts. It is not logically to be expected that, on identical sales, one juror would hold the sale to Black was fraudulent, and another juror would say the sale to White was fraudulent, creating a non-unanimous verdict as to use of the mails in execution of fraud. The illogical character of that kind of an argument should not be allowed to destroy the appeal for due process which Weiss makes in a case where the two accusations of wrong-doing in one count can be fairly distinguished one from the other, **and reasonable men could logically differ in their findings of guilt or innocence as between the alleged offenses.** When this sort of situation arises, as it has most certainly arisen in the case at bar, the courts of the land should be prompt to defend the constitutional right of an accused to be tried, clearly and unambiguously, for only one offense at a time, so that the unanimous verdict of the necessary twelve jurors under federal law may at all times be unequivocal upon the issue of his guilt or innocence.

What we have said in the foregoing is applicable to all of the counts of the indictment, but it becomes particularly pointed when we apply it to Count 1 under which Weiss was sentenced. The mail fraud law does not deal with generally corrupt inclinations or anti-social intentions. It deals with "schemes" or "artifices", or "pretenses", "representations", or "promises". There may be a single continuing generally evil intent on the part of an

individual, who expresses it intermittently by a definite "scheme" or "artifice" to defraud, or a "pretense", "misrepresentation" or "promise" in order to obtain money or property. If he uses the mails to execute the definite "scheme" or "artifice" to defraud, or the obtaining by "pretense", "representation", or "promise", which he has conceived or made, he violates the law. But the intermediate existence of an evil inclination cannot consolidate two distinct "schemes" or "artifices", or "pretenses", "representations", or "promises", into a single one when by nature they themselves are different from each other. If between the two "schemes", "artifices", "pretenses", "representations", or "promises", he uses the mails to further the one already existing, that mailing cannot be in execution of the subsequent "scheme", "artifice", "pretense", "representation", or "promise", and the jurors should not be told by the court that they shall decide the question of criminal use of the mails by the sending of such an intermediate letter on the basis that both the previous and the subsequent alleged fraud must be regarded as one single transaction. On such a basis a juror would reach the ridiculous result of saying an accused was guilty of a mail-fraud by something he did in May (which the juror thought was fraudulent) because he had mailed a letter in March about something he had done in January (which the juror did not think was fraudulent, but the Court had instructed him it was all one transaction, so what could the juror do about it? He had to take his law from the Court). Such is our procedural situation under Count 1, where the letter was mailed on March 3rd, 1937, after a possibly fraudulent transaction in May, 1936, but before a possibly fraudulent transaction in May, 1937, and the juror (who might not have decided the transaction in 1936 was at all fraudulent) is instructed to regard it as all one single scheme to de-

fraud. So if he does think the subsequent transaction in May, 1937, was fraudulent on the part of defendant Weiss, he is justified, under the Court's instructions, in holding that the prior letter of March 3rd, 1937, under Count 1, was mailed in execution of a scheme to defraud.

As we have said, it is not an evil inclination which the mail fraud law resists. It is the creation of tangible "schemes" or "artifices", the making of false "pretenses, representations or promises". The alleged artifice or scheme of 1936 in this case was to increase a contract price; there was a false pretense that the correct price was $27,000.00 more than it actually should have been. The reward for this trickery, if trickery it was, would be one amount, $27,000.00. Belief of a juror in the existence, or non-existence, of fraud here would depend on a state of facts which was complete by the end of May, 1936. On the other hand, the alleged artifice or scheme of 1937 in this case was to present a false bill for extra work; here was an entirely different, independent, false pretense that the true value of extras was about $29,000.00 more than it really was, which amount would be the reward of that trickery, and trickery on Hart's part we are sure it was. Belief of a juror in the existence, or non-existence, of fraud in this instance would depend on a new state of facts which did not begin to exist until at least the end of March, 1937.

Between the two alleged artifices, the two false pretensions, one in May, 1936, the other after March-end, 1937, there is not a fact in the record to demonstrate continuing fraud on Hart's part, much less on the part of Weiss. The government's whole case that the **two** transactions were **one** scheme is founded on nothing more than an assumption of a generally evil inclination over the intervening year on the part of not only the chief

actor, Hart, but the secondary figure in the case, Weiss, as well.

As indicative of the fact that the Circuit Court of Appeals for the Fifth Circuit did not grasp, in its original opinion, the true aspect of our complaint that Weiss had been tried on two schemes to defraud at one time, that Court cited the five following cases in support of the "one scheme" contention:

Sunderland v. U. S., 19 Fed. (2) 202;
Sconyers v. U. S., 54 Fed. (2) 68;
Belt v. U. S., 73 Fed. (2) 888;
Morris v. U. S., 112 Fed. (2) 522;
Leche v. U. S., 118 Fed. (2) 246.

The first listed case, the *Sunderland* case, was from the Eighth Circuit; the other four are from the Fifth Circuit.

Every one of these cases deals with a simultaneous transaction, and they are cases not fairly to be compared with the case at bar. We will take them in reverse order in point of time.

In the *Leche* case there was one general scheme to buy motor-trucks under fraudulent circumstances. The scheme resulted in two purchases, identical in system, and provable by the same witnesses and practically the same evidence. There was no room for a juror to make a distinction of guilt or innocence between one sale or the other sale, under the same arrangements and with the same people. This is entirely different from the situation in the case at bar, where there are two separate sets of facts, transacted through different witnesses, and where a distinction might be reasonably made as to guilt or innocence in one or the other.

In the *Morris* case there was one single and general

scheme to sell fake life insurance policies, with 11 mailing counts. The contention was that these counts were duplicitous, not by reason of different factual schemes being included in the same count, but because "the indictment contained or united two offenses (see page 526), one a scheme **to defraud** and the other a scheme or artifice **to obtain** money by false pretenses." The court answered the contention by citing its previous decision in *Livezey v. U. S.*, 279 Fed. 496, where it was said: "It is not pointed out in argument that there is a difference between a scheme to defraud and one to obtain money by false and fraudulent representations, and we are unable to perceive any."

The *Belt* case likewise involved only one scheme. This was a scheme to induce divers persons to subscribe and pay for shares in a venture to manufacture and market helium gas and dry ice. There was only one scheme, and seven mailing counts on the one scheme in the indictment. There was not even a contention in the case by the appellants that more than one scheme was involved. The contention was that the indictment was duplicitous "in its allegations of **the several representations** complained of as being false and fraudulent."

In the *Sconyers* case, Sconyers was charged with a scheme to sell interests in land which he falsely represented contained oil and gas. He was said to have conducted fraudulent selling campaigns by mail. There were five tracts of land involved, and while none of the letters used in the mailing counts referred to all the tracts of land, the swindle was identical in its facts throughout.

The Fifth Circuit Court said: "A letter may be used for the purpose of executing a scheme to dispose of several tracts of land, although it refers to only one of such

tracts; for the advancement of any part necessarily aids in the execution of the entire scheme."

Then the Court made a further significant observation:

> "What appellant really complains of is a possible variance between the indictment and the proof; but such variance, if any existed, is not shown **and could not in any event be taken advantage of by demurrer to the indictment."**

We say the last quoted paragraph is significant because we are sure that what the court had in mind in this *Sconyers* case has come to pass in the case at bar. In other words, this decision was upon demurrer. It virtually says that if there turned out to be a variance between the indictment and the proof, then the decision would have been different. And in the case at bar that is what happened. The indictment alleged that there was only one scheme, and the trial judge so charged the jury, **but the fact remained that the proof demonstrated the absence of any showing of a contemporaneous continuing plan of double fraud;** on the contrary, the testimony of Seybold showed that in point of time of their existence, the two schemes were separate, independent and remote from one another, **and the later scheme was subsequent to the mailing in Count 1.**

In the *Sunderland* case, there was a general related scheme to sell certain corporate securities on false representations, and by use of the mails. While the scheme was complex, its details were contemporaneous, and the narrative was proved by the same general evidence, which is not the situation in the case at bar.

It is, of course, elementary that two separate offenses cannot be included in one count of an indictment. *U. S. v. Dembowski*, 252 Fed. 894; *U. S. v. Blakeman*,

251 Fed. 306. And where two distinct offenses are each set out in adequate terms, an indictment is bad for duplicity, **and neither allegation can be rejected as surplusage.** *U. S. v. Patty*, 2 Fed. 664.

It must be borne in mind that we are not now dealing with two offenses growing out of the same set of facts and pleaded in the conjunctive, such as a charge that the accused did a certain act and attempted so to do. This is permissible. But separate and distinct acts, involving different proof, and not arising out of the same facts, cannot be consolidated, especially where the acts done are of such different nature that the jury might regard one as corroborative of the other, or divide in their conclusions as to the set of facts on which guilt should be found. *Kidwell v. U. S.*, 38 App. D. C. 566.

The contention that the gist of the offense is the mailing can not excuse the duplicitous nature of the count as to the essential element of the offense that the accused must have devised a scheme to defraud **in execution of which** the mailing took place. *Hass v. U. S.*, 93 Fed. (2d) 427; *U. S. v. Buckner*, 108 Fed. (2d) 921.

These two last-cited cases present the closest parallels to the case at bar which we have been able to find. The *Hass* case was decided by the Eighth Circuit Court of Appeals in 1937. It was the case of the merger of two fraternal insurance societies, the Modern Brotherhood and the Foresters. The defendants were indicted in five mailing counts and one conspiracy count. In that case the indictment was founded on the assumption by the government attorneys that the plan, to divide $300,000.00 between certain officers of the Modern Brotherhood to be obtained by engineering the merger, was contemplated by the defendants from the very beginning of the transaction, just as the prosecution now **assumes** that the

padding of the extra work account in 1937 was contemplated by Weiss from the very beginning of the Louisiana Polytechnic contract.

The Eighth Circuit Court reversed the conviction, saying (93 Fed. (2d), at page 435):

> "There is, we think, another rather obvious defect in the evidence. The five notices described in the indictment were mailed to delegates not later than November 27, 1931. The convention was held December 9, 1931, and the $300,000 was divided among the defendants on December 16, 1931. Unless the scheme to defraud existed prior to the dates of the mailing of the notices, the mailing of them could not constitute a misuse of the mails under section 215, Criminal Code, 18 U. S. C. A. Sec. 338. Chew v. United States, 8 Cir., 9 F. 2d 348, 352; Gammon v. United States, 8 Cir., 12 F. 2d 226, 228. The evidence which tends to prove that the scheme devised by the defendants with respect to the obtaining of the $300,000 existed prior to the mailing of the notices, **we regard as inadequate to establish that fact.** There is evidence indicating that the defendants had knowledge of the 'special contracts' before the notices were mailed, but no competent evidence that prior to that time they had planned that Parks should divide the $300,000 with them. There are only two items of evidence that we have been able to find which indicate that the scheme sought to be charged ante-dated the mailing of the notices. Mr. Sherin, the former secretary of the Modern Brotherhood, testified that some time after the merger, at a meeting where all of the defendants were present, he asked Mr. Parks how long had the boys known that they were going to get this money (the $300,000) and he (Parks) said 'all the time'. A Mr. Patton, a post office inspector who had interviewed Parks in 1934, testi-

fied: 'Inspector Sparks asked Mr. Parks and I also asked him if these directors or former directors of the M.B.A. did not know that they were going to receive certain sums of money because of this merger agreement, but Mr. Parks denied that they did know. However, he stated they were no chumps.' This evidence, when taken in connection with all the facts and circumstances, **might create a strong suspicion** that the defendants, prior to the dates when the notices were mailed, had planned to divide the $300,000 to be paid Parks upon the consummation of the merger, **but it hardly goes further than that.** The statement of Parks as to what the other defendants had known was a mere conclusion, and furthermore, it is impossible to tell what period he meant to cover by the words, 'all the time'. His statement to the post office inspector to the effect that the defendants 'were no chumps', is too weak a peg upon which to hang a conviction for a felonious use of the mails. It is not at all impossible that it was after the notices were mailed that those defendants who were officers and directors of the Modern Brotherhood conceived the idea of making Parks divide the first $300,000 of his commission with them. The case of Marshall v. Lovell, 8 Cir., 19 F. 2d 751, 752, presents a somewhat parallel situation in a civil case. There a trustee made the wrongful exaction from a broker just as the deal was being consummated." (Emphasis ours).

The *Buckner* case was almost on all fours with the case at bar. There the defendants had gotten into a venture, generally fraudulent in complexion, to promote the redemption by Congressional appropriation of bonds of the Philippine Railway Company. During the early stages of the proceedings, the defendants were alleged to have committed one fraud, the dissipation of expense

money which they had collected from bond-holders, in parties and entertainments apparently more for their own amusement than for the benefit of the venture. Later, they embarked on a more ambitious fraud, the manipulation of, and trading in these bonds, under information resulting from their own activities. Two of the counts (like counts 1 and 4 of the indictment at bar) were predicated on letters mailed between the first alleged fraudulent transaction, the parties and entertainments, and the second alleged fraudulent transaction, the market manipulations. The government proceeded to assume, as in the case at bar, that the whole plan was one continuing fraud, just as in the *Hass* case, and now in the case at bar, and charged the whole scheme duplicitously in each count.

The Second Circuit Court of Appeals set aside the conviction (January 8th, 1940) on the two counts which ante-dated the second fraudulent scheme, saying (108 Fed. (2d), at page 925):

> "Defendants' main objections to the indictment really go to the substance of the charges themselves and the sufficiency of the proof to support convictions on each count. If a conviction on a given count is to stand, it is not enough that there was evidence of a scheme to defraud. It must also be shown that the mails were used as part of the fraudulent scheme, **and as to each letter relied upon,** that the particular letter was not sent out **until after a scheme to defraud had been born.** Hass v. United States, 8 Cir., 93 F. 2d 427.
>
> "The first seven counts in the indictment are each based on an identified letter sent through the mails. Counts one and six concern solicitation letters signed by Buckner, sent to bondholders on or about July 7 and 8, 1937, respectively. Counts

two, three, four, and seven are based upon letters requesting donations to the committee or acknowledging their receipt, on or about September 29, October 1, August 3, and October 1, 1937, respectively. Count five refers to the letter reporting the progress of the committee, sent out to all bondholders on April 5, 1938, after Buckner's return from Manila. Count eight is the conspiracy charge.

"We think the proof is insufficient as to counts one and six. At the time, early in July, 1937, when these first solicitation letters were mailed, no fraud appears to have been committed. The first committee deposit was made on July 10, the first withdrawal on July 12, 1937. The petty night club misappropriations did not occur until later in July; the major scheme to take secret speculation profits at the bondholders' expense was not shown to have then been formulated. Nor is there any unequivocal evidence of a then existing intent to misappropriate the funds solicited. True, there is proof of the desire of Buckner and Gillespie to direct and control the committee, of their refusal to follow advice as to the solicitation of funds for expenses, and even of the tampering with the resolution preventing withdrawals of funds from the bank without the countersignature of their counsel. But as to the latter it appeared that their counsel wished to avoid this responsibility, and the evidence does not prove that the resolution was altered in order that the funds might be misused. Subsequent acts, too, may often support an inference of prior intent, but we do not think the evidence sufficient to permit the jury to do so here. It does not seem a proper inference that, at the inception of negotiations involving millions, a budding financier, whatever his aspirations as a playboy, would have solicited money from bondholders with a preconceived intention to misappropriate the funds in the petty dissipations disclosed at the trial. As to the more serious frauds involving market tips

and the sharing of secret profits, it is quite possible, on the evidence submitted, **that Buckner did not turn to this method of doing business until the legitimate sources of securing moneys for committee expenses had been tapped dry.** Compare Hass v. United States, *supra;* Beck v. United States, 8 Cir., 33 F. 2d 107, 111."

EVIDENCE OF COLLATERAL MATTERS

On the theory that they afforded legitimate and proper proof of "system" or "intent" against Weiss, numerous matters of evidence, relating to at least a dozen transactions entirely disconnected from the subject matter of the indictment, were admitted by the trial judge, over defense objections. To discuss them all fully would require a detailed review of the facts of each, and then a comparison with the facts of the main case. This, we fear, would enlarge the present application beyond the contemplation of Rule 38 of this Court. We will content ourselves with summarizing the more flagrant errors of this character, in the hope of presenting a *prima facie* showing for a writ of review, and, if same be granted, we will then be able to go into greater detail.

In the first place, the charge under the indictment was one of fraud in two ways, first by altering a contract price, then by inflating charges for extras, and, most specifically of all, by **concealing from the constituted authorities in charge of the institution** that the price change had been made and the proper charges for extra work had been exceeded. We respectfully call to the attention of your Honors that the allegation of the false pretenses, which is indispensable to an indictment for mail fraud, expressly relies upon the concealment of the increased prices from the authorities of Louisiana Polytechnic Institute as the meat of the fraud. Such

was the nature of the criminal act charged to have been done by Weiss in the case affecting Louisiana Polytechnic Institute.

To illustrate the alleged guilty intent of Weiss in such alleged concealment from the officials of Louisiana Polytechnic Institute, the prosecution then brought up two groups of transactions, one group occurring at Louisiana State Normal College, and the other group occurring at Louisiana State University. Had the prosecution stopped here, the situation would have been bad enough, but they attempted to add inference on top of inference, by going in evidence to a still further group of transactions, using this only secondly related group in the hope that the jury would infer guilt against Weiss in the first related group, and thus infer guilt against Weiss in the case in chief.

What we mean by this, for example, is that the episode of the experimental switchboard at Louisiana State University was introduced in evidence as a possible inference of Weiss' guilty intent in the Louisiana Polytechnic transaction. But it was not clear even then that Weiss had done anything wrong in connection with the experimental switchboard payment; so the prosecution proceeded to a third stage. It offered a check for $2,500.00, **which was a collateral matter even to the experimental switchboard matter;** and this third stage of the proceeding, the $2500.00 check in the Marks-Isaacs department store matter, was certainly a transaction bearing not the slightest similarity to the Louisiana Polytechnic transaction under the indictment.

For another example of the extreme degree to which this sort of thing was allowed to be carried, the prosecution was permitted to offer evidence about an alleged excessive payment to Louisiana State University on the

restoration of the While Female Building on the Charity Hospital grounds. After this evidence was in it was not clear that Weiss had done anything here with wrongful intent; so again the prosecution proceeded to a third stage in this kind of proof. It offered, and was allowed to prove, for the purpose of showing a realization of wrong-doing in the final payment on the White Female Building, that Hart, not Weiss, **and out of the presence, and without the knowledge of Weiss,** had concealed the White Female Building payment in the Animal Industry Building account on the books of Caldwell Bros. & Hart. This, of course, proved no guilty knowledge against Weiss, but it was calculated to add prejudice against him.

The evidence concerning the business of the Southern Dairy Products Company was in effect a collateral matter secondly removed from all other transactions in the case. In order to strengthen a possible inference of the guilty intent of Weiss in the Louisiana Polytechnic transaction, all of the collateral transactions with Caldwell Bros. & Hart were offered; and then, in order to draw a separate inference of guilt out of those collateral matters, **the further collateral matter** of the relations of Caldwell Bros. & Hart and the defendant Weiss in the dairy company was put in evidence.

But even more remote and dissimilar from any of these, were the transactions, allowed to be gone into before the jury, (1) between Weiss and Leche on the latter's building contract in St. Tammany Parish, and (2) the transaction of the $75,000.00 check with Dr. Smith. There was not the slightest detail of similarity between the indictment case on the Louisiana Polytechnic job and the Leche job in St. Tammany Parish. The latter was so utterly unrelated to anything in the main case that it was plainly offered to prejudice the accused in violation of the general rule of evidence on relevancy. In

the hostile state of the public mind toward Leche at the time of the trial, a showing of any connection between Weiss and Leche, particularly on "the Gold Coast of St. Tammany Parish", as the Assistant United States Attorney attempted to bring out on cross-examination, was well calculated to prejudice Weiss in the eyes of the jurors.

The incident of the $75,000.00 check of Dr. Smith was the most glaring error, of admission of evidence, committed by the Court. In the prosecution's anxiety to prove against Weiss that he had been the recipient of some benefits from Smith, they over-reached themselves, we think. There was put into evidence, and allowed to go into evidence, without proper investigation, and without opportunity to the defense for investigation, this proof of the handling of the $75,000.00 check between Smith and Weiss. It not only had nothing to do with, and no similarity to, anything which had occurred on the Louisiana Polytechnic job, **but it has turned out that this $75,000.00 check was not even connected with any of the construction or architectural transactions at Louisiana State University.** It was a wholly independent, and thoroughly dissimilar transaction; independent of everything in the case, **even the other collateral proof which it may have been thought by the prosecution to relate to.** In final analysis, it was simply a link in a scheme of Dr. Smith, in which Weiss, through his trust in the integrity of Dr. Smith, had been used in passing, by Dr. Smith, as a dupe in connection with one of Smith's operations of gambling in the stock market. That the matter of this $75,000.00 check was quite collateral to the indictment case must be conceded; that it was in no way similar to the transaction on trial cannot be denied; and that it is bound to have been highly prejudicial to Weiss is shown by the trial judge's own comment, when he once

declined to admit any evidence about alleged relations of Weiss with Dr. Smith, saying that the very fact that Dr. Smith was notoriously known to be then in the penitentiary would, of itself, prejudice Weiss.

In his argument, the Assistant United States Attorney repeatedly charged Weiss before the jury with having received this $75,000.00 from Smith. We are sure he was at the time honest in this belief, or he would not have made the direct statement. We are also sure that representatives of the government then in the courtroom knew that he was making a mis-statement and purposely refrained from correcting him. This mis-statement was bound to have created great prejudice against Weiss, and hence we say that the admission of the evidence on the $75,000.00 check was not only an error, but highly prejudicial error.

Likewise, the whole basis of the indictment case was that Weiss, as architect, **had concealed from the Louisiana Polytechnic authorities** the correct obligations of the institution for the work done, by secretly increasing the contract price, and by allowing excessive charges for extras. In all of the instances at Louisiana State University used in collateral proof, the approval of the contractors' prices was always with the knowledge, on the specific approval, **and on some occasions by the instructions of the school authorities.** Take, for instance, the compromise of the contract for the Dental School foundation, the price of which was settled, not by the architects, **but by the president of the university,** where the architects merely carried out his instructions. Take also the instance of the bookstacks in the Law School building, **where the architect certified, in writing, to the president of the university, what the lowest bid was for this equipment, and the president of the university himself made the contract for a higher price,** and personally

approved, in writing, the certificates of the architect when they were issued **in accordance with the contract he had made.** In fact, all of the payments at Louisiana State University which have been referred to in this trial were personally examined and approved, and usually directed by Dr. Smith, and your Honors will find, on every certificate in evidence relating to a Louisiana State University job, the cryptic endorsement "O.K.—J.M.S." Additionally, in most of the Louisiana State University work, unlike the Louisiana Polytechnic job, the transactions referred to involved incidentals on which the architects exercised no supervisory authority, and on which they served the university as a matter of accommodation and without charging any architects' fees. This is well illustrated by the examples of the compromise of the contract for the foundations on the Dental Building and the restoring of the White Female Building. It happened that Weiss, Dreyfous & Seiferth had designed the large Dental School Building, the project to build which was later abandoned. They had been paid a fee for the un-used plans and specifications, but they were not paid anything, nor did they claim anything, for any further work. When they were asked to issue a certificate in compromise of the foundations contract, they did it for Dr. Smith as a matter of routine and without expecting any pay for what they then regarded as a mere clerical detail. The same is true as to the inspection made, at the request of Dr. Smith, of the work done in remodelling the White Female Building (which it was later learned had actually been performed by the mechanics of Charity Hospital, not the employees of Caldwell Brothers).

While it is probable that eventually Weiss, Dreyfous & Seiferth would have been paid (they never have been paid) architects' fees based on the cost of the experimental switchboard in the Physics and Mathe-

matics Building and the bookstacks and furniture in the Law School Building, at Louisiana State University, it is also a fact that those installations were matters more or less incidental to the real job of the architects, the construction of the buildings proper. We can fairly assume, from the fact that nothing was brought up about it, that no such irregularities existed, on the construction jobs proper at Louisiana State University, of the character of the irregularities at Louisiana Polytechnic Institute charged in the indictment. We contend that it is not compliance with the sort of similarity the law of evidence requires, to compare what happened on incidental and accessory matters, not directly under the supervision or entirely within the responsibility of the architects, with what happens on a main building contract, such as the Louisiana Polytechnic job.

For all of these reasons, we earnestly contend that much, if not all, of the collateral proof admitted in evidence, and which we vigorously objected to at all times during the trial, was improperly admitted under the rules of evidence, led to great confusion in the minds of the jurors, and otherwise deeply prejudiced them against the accused.

Let us turn our attention more particularly, however, to the episode of the $75,000.00 check which we have most vigorously complained of, and which, as we have pointed out, was the basis of the dissent by Judge Sibley in the Circuit Court of Appeals for the Fifth Circuit. It becomes necessary to review these facts in more detail.

In the examination of the witness Seybold, on Tuesday, October 22nd, 1940, the Assistant United States Attorney propounded the following question (Tr. Vol. I, p. 619):

"Did Monte E. Hart or the firm of Caldwell Bros. & Hart loan any money to the President of that university?"

Any loan of money by the contractors to the president of Louisiana State University, brought up in a trial involving work at Louisiana Polytechnic Institute, appeared to us so far from the subject-matter of the case that we interposed an objection. The trial judge heard argument on this objection out of the presence of the jury. The Assistant United States Attorney said (p. 621) that he proposed to show that the firm of Caldwell Bros. & Hart had loaned President Smith several thousand dollars, and that Hart had turned over to Smith $50,000.00 worth of certificates, or bonds, to use in some speculation; the Assistant United States Attorney further said that his purpose was to show the method by which Hart, together with Weiss, schemed. He further proposed to show that Smith paid Weiss $20,000.00 on an architect's certificate that the university had already paid; and that Caldwell Bros. & Hart had loaned the wife of Dr. Smith money. Then the Assistant United States Attorney outlined other matters he said he intended to prove, including the White Female Ward Building, and the dental building foundations compromise, already discussed in this brief.

The trial judge, at this time, declared (p. 635) that he thought the matter of introducing evidence of transactions with Smith was "too far fetched"; that if it had involved in any sense the corrupting of President Richardson or anybody in connection with the Louisiana Polytechnic Institute, then whatever Hart did under an illegal agreement with Weiss would be the act of Weiss; but the trial judge then thought it was "going too far afield to go into the transaction of the bonds and loans to Smith and so forth at this time" (p. 636). At the

close of this colloquy the trial judge said (p. 640): "There is a good reason why I shall not permit this Smith matter to be gone into unless it falls within that category and that is a matter of common knowledge known to this jury and public generally which is that Dr. Smith is now serving a term in the penitentiary **and it would be highly prejudicial if it were not legally advisable (admissible).**"

After the jury was brought back in, defense counsel asked for a ruling in the presence of the jury in order that a bill of exceptions might be taken. The court ruled that the Government would be allowed to prove such transactions as dealings in which Caldwell Bros. & Hart were the contractors and the defendant was an architect, and which were of a similar nature and transpired along about the same time. The trial judge further said (Tr. Vol. II, p. 641):—"When a situation arises that warrants it, the court will hear enough of the evidence to determine its admissibility, out of the presence of the jury, and then decide whether that transaction is to go to the jury".

We repeat these words of the trial judge in connection with our comment that, although such may have been the intention of the trial judge, it was never carried out. Every piece of evidence objected to, and which was allowed to go in, was given for the first time in front of the jury.

The defense took its bill of exceptions to the ruling above referred to, and the trial judge said: "The objection and ruling will be made general to all evidence of a similar nature" (p. 641). The prosecution then went on to offer its evidence of the collateral matters complained of in this brief. There were times when we made other objections, provoked other rulings, and took

other bills, but these were usually on the spur of an impulse, and we think that even without additional bills we were fully protected in our client's rights by said general ruling of the court.

When we thereafter told the judge that it was impossible to defend at the instant on these numerous other matters, and that all of the defendant's records of other work than the Louisiana Polytechnic job were in New Orleans, he suspended the trial for one day, Wednesday, October 23rd, 1940, to permit defendant and his counsel to make a round trip by automobile of 600 miles within about 36 hours to get the defendant's records. In addition to the fact that very little could be accomplished in such a short time and under such pressure, we were also put at a disadvantage by the fact that the Assistant United States Attorney, we are sure with the best of intentions toward us, gave us a list of those matters he then intended to prove, **but did not include on that list anything about the transaction of a $75,000.00 check between Weiss and Dr. Smith,** which transaction we are about to explain in detail. In fact, after the statement of the trial judge (Tr. Vol. I, p. 640) that he would not "permit this Smith matter to be gone into", we were under the belief that any of the personal transactions of President James M. Smith would be excluded from the case.

We were therefore taken very much by surprise, near the conclusion of the trial, when during the night session of Friday, October 25th, 1940, the Assistant United States Attorney suddenly asked the defendant on cross-examination: "Now Mr. Weiss I believe you had some financial transactions with Dr. James Monroe Smith."

The propounding of such a question, of course, put

us right back to the issue which we had faced on the previous Tuesday afternoon of the trial, and which we thought the court had settled, and which we had not made any preparation to meet during the one day allowed to us by the court to prepare a defense on the anticipated collateral matters. We again objected, and the jury was retired. The Assistant United States Attorney then raised two matters he said he proposed to prove, one an alleged double payment for architect's fees on a university stadium job, and secondly, a bank cashier's check for $75,000.00 given to Weiss by Dr. Smith and endorsed by Weiss. We argued that neither fo these matters was connected in any way, even remotely, with the indictment on trial and were merely being interjected into the case to prejudice Weiss by connecting him with the convicted Smith, along the lines which the court had already commented on.

The trial judge finally ruled (Tr. Vol. II, p. 1069): "I am going to exclude the $20,000.00 transaction. I think it is going back too far and involves too much, but in the statement he made with regard to the $75,000.00 check, **he should be able to make an explanation to stand up under that."**

In other words, the attitude of the trial judge on this entirely unrelated transaction of the $75,000.00 check, utterly dissimilar from any issue of the indictment, **was that the burden should be imposed upon the defendant of explaining that matter to the satisfaction of the jury.** This holding not only violated the rule as to irrelevancy of evidence, but it violated the fundamental **burden of proof** in a criminal case.

The jury was brought back in, and the prosecuting attorney handed the defendant the Exhibit G-56, and asked him if it was not a cashier's check drawn to his

order for $75,000.00 and given him by Dr. James Monroe Smith. We noted our objection.

The court said (p. 1069): "The evidence is admitted for its bearing upon the transaction with respect to the dairy in which the witness has testified that some $75,000.00, represented by the check (checks) paid to him by Hart or Caldwell Bros. & Hart, represented an investment in the company, and having heard counsel out of the presence of the jury, **this evidence is admitted in connection with that particular transaction as throwing some light upon it.**"

It will be seen from this statement by the court that what was in the trial judge's mind was that he was admitting this $75,000.00 check **because it had or might have some relation to the affairs of the Southern Dairy Products Company,** in which it had been already testified that Caldwell Bros. & Hart had invested, and in which Weiss was a leading stockholder. As a matter of fact, with all respect to the then opinions and beliefs of the learned Assistant United States Attorney, the $75,000.00 check **did not have the slightest relationship** even to the Southern Dairy Products Company business, **as the trial judge would have learned if he had given defense counsel a reasonable opportunity to investigate this check and had first heard the real facts of the matter out of the presence of the jury.**

Instead of that, Weiss was confronted with this check on the witness stand, was forced into a naked denial of the prosecution's contentions, and insinuations, without the slightest opportunity to seek the necessary evidence to show the true history of the check. It should be added that neither Weiss nor his attorneys then knew themselves what was the true history of that check.

The night session at which this check was admitted

into evidence lasted until late on that Friday night. The trial was resumed as early as 9 o'clock on Saturday morning, and was pressed almost hurriedly to a conclusion, because it was the week-end. The opening argument of the prosecution was made even before the dinner recess Saturday. There was absolutely no time in which defense counsel could have investigated this $75,000.00 check matter.

As a matter of fact, when Weiss was confronted with the check (Exhibit G-56) on the witness-stand Friday night, defense counsel walked up to the witness-stand and looked at the check. It was offered by photostat, and the same photostat which was handled on that occasion is in the bundle of original exhibits and we ask your Honors to examine it very carefully.

You will see that it is cashier's check No. 4745 of the Discount Department of the National Bank of Commerce, dated at New Orleans on June 15th, 1938 (over one year after the Louisiana Polytechnic job was finished), made payable to the order of Leon C. Weiss, for the sum of $75,000.00, and signed by an assistant cashier of the bank.

Now we ask your Honors to turn the check over. On the back of it appears the endorsed signature of Leon C. Weiss. Under that is the signature of what, we thought in the courtroom, was the name "O. M. Browne", but which we later found out was "J. M. Browne".

It must be explained that the lights in the courtroom around the witness box, where the check was read by defendant and his attorneys, were not bright.

We asked our client on redirect examination (Tr. Vol. II, p. 1133):

"Q. Since the check left your desk has it acquired any additional endorsement?"

"A. Yes, it has the endorsement of a man by the name of O. M. Browne. I believe it is O. M."

Actually the endorsement was J. M. Browne, and we learned later that J. M. Browne was the name of a man through whom, or with whom, President Smith of Louisiana State University had been speculating with the university's money in the stock market.

On the night of the trial, and in the uncertain light around the witness-stand, we read the signature as O. M. Browne, and everybody (and we are sure that this includes both the Assistant United States Attorney and the trial judge) failed to see the most significant thing on the check. Your Honors will have **to look close to see it in daylight.**

THERE WAS THE FURTHER ENDORSEMENT, BY STAMP, UNDER THE SIGNATURE OF BROWNE, OF THE WORDS, TWICE STAMPED: "FOR DEPOSIT, FENNER & BEANE."

In the absence of any knowledge at the time as to who Browne was, and due to the failure of anybody to notice the deposit endorsement of the brokerage firm of Fenner & Beane, the Assistant United States Attorney, despite Weiss' denials, stood up before the jurors next morning and told them eloquently, emphatically and repeatedly, that Weiss had gotten $150,000.00, that he had gotten $75,000.00 from Caldwell Bros. & Hart, and he had gotten another $75,000.00 from James Monroe Smith. Before a jury of farmers and small business men this declaration, made over and over again in argument by the Assistant United States Attorney, backed up by the admission by the trial judge of the $75,000.00

check in evidence, was a tremendous prejudice, and we think sealed the fate of the defendant before that jury.

The outrageous thing about this situation was that government agents were in the courtroom, assisting the prosecution in these collateral matters, who, we learned afterwards, had thoroughly investigated the history of this check, knew where this $75,000.00 had gone, but who sat silent while the Assistant United States Attorney repeatedly voiced his charge that Weiss had gotten this money, without telling the prosecutor, we are sure, what the actual facts were.

As soon as we got back to New Orleans and the banks opened Monday morning, defense counsel went to the National Bank of Commerce to trace the history of this check. In the apparent absence of a deposit stamp on it, we assumed that it had been cashed at the bank which issued it. To our surprise, we found that it had been cleared through the Whitney National Bank before payment by the National Bank of Commerce. We investigated further and found that, in the Whitney National Bank, it had been paid to the account of the well known stock brokerage house of Fenner & Beane.

We telephoned the courthouse at Monroe and asked somebody to look closely at Exhibit G-56, and when it was examined in daylight, we were informed that the very faint deposit endorsement, by stamp, of Fenner & Beane, was found thereon.

We went to the office of Fenner & Beane and examined the account to which this $75,000.00 had been credited and learned who J. M. Browne, not O. M. Browne, was; and with all of this information, we reconstructed the following true history of the check, which convincingly shows that Mr. Weiss had told the truth, that he

had not himself gotten this $75,000.00, or any part thereof, and that in the transaction he had been made the unwitting tool of the scheming Smith.

Smith, as is well known now, had been gambling in the stock market, using the treasury bonds of Louisiana State University as collateral. He had arranged a loan, on a block of these bonds, from the National Bank of Commerce on June 15th, 1938, the date of the $75,000.00 check. He, evidently to make it appear as though he were getting the money for purposes of the university, and not for himself, asked the officers of the National Bank of Commerce to issue this $75,000.00 check to the order of Leon C. Weiss, explaining that Weiss was architect for the university. He then took the check to Weiss at the latter's office, and offered to pay it on account of fees, intending, we assume, to ask for the loan of it back, as he had done on another occasion in connection with certain bonds of the university (given to the architects in payment for work at a time when the university was short of cash). Weiss probably upset this intention by telling Smith that the university did not owe his firm anything like $75,000.00; whereupon Smith said that it was evidently a mistake in amount, that he did not want to take the check back to the National Bank of Commerce, where the money had been borrowed, and for Weiss to accept the check and give the university the check of Weiss, Dreyfous & Seiferth in refund.

Pursuant to this suggestion, Weiss not only endorsed the National Bank of Commerce check, but had a clerk in his office write out a firm check for the equivalent amount. Then, on further thought, Weiss changed his mind about this procedure, and told Smith to either get a new check from the National Bank of Commerce or deposit the endorsed check directly in the university's

bank account. He had the firm check, already written, cancelled on the stub in the firm's check-book, as we found it in our investigation.

All this had happened two and a half years before the trial. It may seem an unbusiness-like way of handling the check, from the viewpoint of Weiss, who thus put into circulation a check for that large amount bearing his endorsement. And yet it must be remembered that, in the first place, it was a check which had the entire resources of the National Bank of Commerce behind it (unlike a personal check), and, secondly, the man who was handling the check was, at that time, June 15th, 1938, and for at least a year afterward, the highly respected and completely trusted head of the State's university. There was no reason for Weiss, at that time, not to share the same complete confidence in Dr. Smith which Smith enjoyed from the large board of directors of the university, composed of many of the most responsible and reputable business and professional men of Louisiana.

Under these circumstances, Smith departed from the office of Weiss with this endorsed check for $75,000.00 in his pocket. He obviously carried it to J. M. Browne, through whom he was carrying on his gambling operations with the Fenner & Beane office. Browne took the check to that office, where the amount was divided, $56,000.00 being apportioned to a trading account in the name of Dr. Smith himself, and $19,000.00 being apportioned to a trading account in the name of Mrs. Owen Ware, Dr. Smith's daughter.

It was clear from this record that neither Leon C. Weiss or the Southern Dairy Products Company had ever received one penny from this check. When the trial judge (p. 1069-1070) said he was admitting the check

in evidence "for its bearing upon the transaction with respect to the dairy", he was not only letting a very remote and disconnected, **and recognized by him as prejudicial** (p. 640) matter get before the jury, but his own basis of admission of same **was completely false in its predicate.** Had he done the things, which any defendant should be entitled to in a trial with deliberation and care, first, afforded adequate time to defense counsel to prepare the trial of new issues, and secondly, looked into the evidence of collateral matters before admitting it, this check for $75,000.00 would never have been allowed in the record. Having been admitted, the fault should now be remedied.

After having assembled these true facts of the history of the $75,000.00 check, which, the Assistant United States Attorney had argued, was paid by Dr. Smith to Mr. Weiss, to the great prejudice of Weiss before the jury, we immediately filed a motion for a new trial on the grounds of this newly discovered evidence, pleading our surprise by the offer of the check at the night session on October 25th, and our inability to have gotten this evidence before the close of the case (see motion for new trial, Tr. Vol. I, pp. 78-91). In this motion, made under oath, we offered to produce the records of the National Bank of Commerce, the Whitney National Bank, J. M. Browne, and Fenner & Beane, and the testimony of all parties related to the transaction. This motion was overruled and we duly reserved our bill of exception.

The well established rule of law is that where, after trial, a party discovers evidence which would have controlled an issue, and the existence of which he was not aware of, or by reasonable diligence could not have been aware of, at the time of his trial, upon a proper showing

of ability to timely produce such newly discovered evidence, he is legally entitled to have the issue tried anew.

We respectfully submit that every element of this rule is complied with in our situation under our motion for a new trial. In the first place, we were taken by surprise by this evidence. After the trial judge's previous ruling that he would not admit evidence of any transaction between Weiss and Smith, in which he added that Smith's confinement in the penitentiary was bound to prejudice Weiss, we dropped any idea that the court would permit evidence of this kind. When we left Monroe for New Orleans on the evening of October 22nd, 1940, for the purpose of assembling evidence on collateral issues, the Assistant United States Attorney gave us a list of the matters to be used in evidence against Weiss. The incident of the $75,000.00 check of Dr. Smith was not on the list. Therefore, when the matter was brought up at the night session of October 25th, 1940, we were totally unprepared to meet it, and there was nothing we could do about it between then and the end of the trial next day.

That the evidence which we discovered in New Orleans two days later would have controlled the issue cannot be doubted. The question, under the production of the check, was whether Weiss, the first endorser thereof, had gotten the money. Weiss denied it, but was not then in a position to explain where the money had actually gone. The Assistant United States Attorney argued to the jury that the check spoke for itself and demonstrated that Weiss had gotten the $75,000.00.

Had the real proof then been available, we would have shown that Dr. Smith spent this $75,000.00 of Louisiana State University's money in stock gambling operations **which Weiss was not connected with in anyway,**

and that Weiss **had not received one penny** of the proceeds of this check.

We respectfully submit that, by every test of the rule on the granting of new trials because of newly discovered evidence, this situation presented, in our humble opinion, the most positive instance, of a right to the setting aside of a verdict and the granting of another trial, which has come under our observation in more than twenty-five years of experience at the criminal bar.

We respectfully submit that it was gross judicial error to have refused to thus correct the mistake which had been made by the admission into evidence of the document Exhibit G-56; bearing in mind, of course, that not only did the Assistant United States Attorney ask Weiss about the check in cross-examination, but after Weiss had legally bound him on this collateral matter by denying receipt of the money, **the United States District Attorney was allowed to contradict Weiss by putting the check itself in evidence and handing same to the jurors for their inspection.** This constituted not merely cross-examination, but affirmative evidence of a collateral matter made by the prosecution to create before the jury an issue of fact with the defendant's denial made on his cross-examination.

CONCLUSION

In the sound judicial discretion of this, the highest court in the land, the last resort from injustice to the citizen, it is earnestly prayed by petitioner that a review of this case on a writ of certiorari will be granted. It is sincerely believed by him and his counsel that whatever may be the aspect of his case, shaped amid the excitement of the recent Louisiana scandals, given color of prejudice against him by participation in the events

described of notorious scandal figures of the times, however dark that aspect now seems, petitioner would not have been convicted had he been given a trial free from the errors complained of in this brief.

There are special and important reasons for a review of this case, aside from petitioner's own interest in its outcome. On both of the points of procedure which we have attacked, (1) the duplicity of the counts by reason of the two separate alleged schemes to defraud, and (2) the admission of improper so-called "system" or "intent" evidence, as illustrated by the aggravated instance of the $75,000.00 check, we think the Circuit Court of Appeals for the Fifth Circuit has decided important questions in an untenable way, and has sanctioned departure by the trial court from the accepted and usual course of judicial proceedings. We consider that the decision of the Fifth Circuit in this case is in conflict with a decision of the Second Circuit (*U. S. v. Buckner*, 108 Fed. (2d) 921).

And while we fully appreciate that at the bar of this august tribunal all men, regardless of station in or past habits of life, stand equal to the acid test of what we call due process, it still seems that one shining shield against suspicion, prejudice, and doubt, should be an admitted high character and fine personal record for a lifetime.

The petitioner is nearly 59 years old. In 1903 he graduated from Tulane University with the highest academic distinction (*summa cum laude*). He gained his master's degree, and subsequently taught at Tulane. He served his country in the First World War, rising to a captaincy; and since the close of that war has practiced architecture, living at New Orleans. He served for three consecutive terms as president of the Louisiana Chapter of the American Institute of Architects, and has had

many other important honors, civic and professional. He is not, and has never been, a politician, or one of the group of politicians which recently brought Louisiana into notoriety. On the contrary, his work in architecture in Louisiana attests to his strict application to professional study, and he is pardonably proud of a new high standard in public building in his State which he has helped create, and which has produced, through his firm, such noted buildings as the present State Capitol at Baton Rouge and the large new Charity Hospital group at New Orleans. All of this took, on the part of petitioner, a tremendous concentration of effort in a comparatively short space of years, and left him little opportunity ot analyze men and their motives. He is of the serious, student type, and there is no doubt that on many occasions he has been seriously imposed upon. But his own reputation for ability, honesty and fair dealing is well established, and even the government's witnesses in this case plainly displayed a favor toward and a respect for the accused, in spite of the events they were testifying about. His parents were honorable and respected citizens, as are those of his wife, and his two little girls and his son have a father to be proud of, except for the present shadow upon them.

A long life of honorable service should deserve a scrupulous fairness of trial on an accusation of crime. To the end that this should be accomplished, we plead for a review of this trial.

Respectfully submitted,

HUGH M. WILKINSON,
JOHN D. LAMBERT,
Attorneys for Petitioner.

Oct. 9, 1941.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	4
Conclusion	10

CITATIONS

Cases:

Belt et al. v. *United States*, 73 F. (2d) 888, certiorari denied, 294 U. S. 713 — 5

Devoe v. *United States*, 103 F. (2d) 584, certiorari denied, 308 U. S. 571 — 7

Dysart v. *United States*, 270 Fed. 77, certiorari denied, 256 U. S. 694 — 7

Hass v. *United States*, 93 F. (2d) 427 — 6

Leche v. *United States*, 118 F. (2d) 246, certiorari denied October 13, 1941 (No. 169, October Term, 1941) — 5

Moore v. *United States*, 150 U. S. 57 — 7

Morris v. *United States*, 112 F. (2d) 522, certiorari denied, 311 U. S. 653 — 5, 7

Regina v. *Francis* [1874], 2 Crown Cas. 128 — 7

Samuels v. *United States*, 232 Fed. 536 — 7

Sconyers v. *United States*, 54 F. (2d) 68, certiorari denied, 285 U. S. 554 — 5

Silkworth v. *United States*, 10 F. (2d) 711, certiorari denied, 271 U. S. 664 — 5

Suhay v. *United States*, 95 F. (2d) 890, certiorari denied, 304 U. S. 580 — 7

Sunderland v. *United States*, 19 F. (2d) 202, certiorari denied, *sub. nom. Thomas H. Matters* v. *United States*, 255 U. S. 575 — 5

United States v. *Buckner*, 108 F. (2d) 921, certiorari denied, 309 U. S. 669 — 6

Statute:

Section 215 of the Criminal Code (18 U. S. C. sec. 338) — 2

Miscellaneous:

1 *Wharton*, Criminal Evidence (11th ed., 1935) sec. 345 — 7

2 *Wigmore*, Evidence (3rd ed., 1940) secs. 304–305 — 7, 9

424951—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 697

LEON CHARLES WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The first opinion of the Circuit Court of Appeals (R. 1231–1236) is reported in 120 F. (2d) 472; the opinion on petition for rehearing (R. 1242–1270) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 9, 1941 (R. 1237), and a petition for rehearing (R. 1238–1241) was denied September 11, 1941 (R. 1270). The petition for a writ of certiorari was filed October 13, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment, charging a single general scheme to defraud, was rendered duplicitous because it alleged separate transactions as means of executing the general scheme.

2. Whether evidence of petitioner's participation in other frauds on the State of Louisiana and its instrumentalities was properly admitted to prove his intent to commit the fraud charged in the indictment.

STATUTE INVOLVED

Section 215 of the Criminal Code (18 U. S. C., Sec. 338) provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the Post Office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An indictment in nine counts was returned against petitioner and Monte E. Hart on November 14, 1939 (R. 2–34). They were charged in the first eight counts (R. 2–30) [1] with using the United States mails in the execution of a scheme to defraud the State Department of Education of Louisiana, the State Board of Education, Louisiana Polytechnic Institute, and the State of Louisiana, its taxpayers and citizens, of approximately $56,914.42.[2] This scheme was alleged to have been accomplished in the following manner:

Petitioner was the senior member of a firm of architects employed to draw the plans, supervise the letting of the contract, and superintend the construction of an administration and classroom building at Louisiana Polytechnic Institute (R. 3–4). A low bid of $264,482.13 was submitted by the firm of Caldwell Brothers and Hart (R. 4). As part of the scheme, however, petitioner drafted the contract so as to provide for the payment of $291,482.13 to Caldwell Brothers and Hart, or $27,000 more than the bid price (R. 4–5, 6–7). This fictitious and fraudulent increase in the contract price was concealed from the president of the State Board of Education and petitioner and Hart induced him to sign the contract by falsely representing to him that the price fixed therein was in accordance with the bid submitted by Caldwell Brothers and Hart (R. 5, 6–7). As a further part of the scheme to defraud, petitioner prepared a false final architect's certificate under

[1] The ninth count (R. 30–34) alleged that the defendants conspired to commit the offenses alleged in the substantive counts.

[2] This figure does not correspond exactly with the sum of the alleged $27,000 upward revision of the construction contract and the $29,056.04 overpayment for "extras." This, of course, is an immaterial variance and petitioner makes no point of it.

which Caldwell Brothers and Hart were paid $29,056.04 for fictitious "extras" (R. 5–6, 7–8).[3]

Hart having committed suicide before trial (R. 104–105, 1247), petitioner was tried alone. He was found guilty on counts 1, 2 and 3 (R. 1223), and sentenced to five years' imprisonment on the first count (R. 1225). Imposition of sentence on the second and third counts was suspended and petitioner was placed on probation (*ibid*). The Circuit Court of Appeals, with one judge dissenting, affirmed the conviction (R. 1231–1237), and on petition for rehearing reaffirmed its prior decision (R. 1242–1270).[4]

ARGUMENT

I

Although the theory upon which petitioner bases his contention that the indictment was duplicitous is somewhat obscure, the argument appears to be that the various counts, particularly count 1, upon which he was sentenced, charged two "separable" frauds, and that, in consequence, there is no assurance that the jurors unanimously concurred in deciding that petitioner was guilty of either fraud (Pet. 8, 13, 14, 17). The contention merits no further review by this Court.

As the court below pointed out (R. 1235, 1243–1247), the indictment charged but one scheme to defraud, namely, a scheme to defraud the State of Louisiana, its educational institutions, and its taxpayers of $56,914.42 by fraudulently increasing the cost of a State building. Petitioner's contention is based upon the averments particularly describing the *manner and means* by which this scheme was carried out, that is, by increasing

[3] The indictment also alleged that part of the scheme was to withhold and conceal copies of the construction contract from the associate architectural firm and from the State and its agents and agencies and to conceal the so-called extras covered by petitioner's final architect's certificate (R. 6).

[4] Since petitioner does not claim that the evidence was insufficient to support the verdict, it is unnecessary to delineate the proof adduced at the trial.

the contract price of the building and by adding a fictitious claim for "extras". It is settled, however, that allegations of separate transactions as means of accomplishing a single integrated scheme to defraud do not render such an indictment duplicitous. *Leche* v. *United States*, 118 F. (2d) 246, 247 (C. C. A. 5), certiorari denied, October 13, 1941 (No. 169, October Term, 1941); *Morris* v. *United States*, 112 F. (2d) 522, 526 (C. C. A. 5), certiorari denied, 311 U. S. 653; *Belt et al*, v. *United States*, 73 F. (2d) 888, 889 (C. C. A. 5), certiorari denied, 294 U. S. 713; *Sconyers* v. *United States*, 54 F. (2d) 68, 69 (C. C. A. 5), certiorari denied, 285 U. S. 554; *Sunderland* v. *United States*, 19 F. (2d) 202, 207 (C. C. A. 8), certiorari denied, *sub. nom. Thomas H. Matters* v. *United States*, 255 U. S. 575; *Silkworth* v. *United States*, 10 F. (2d) 711, 714 (C. C. A. 2), certiorari denied, 271 U. S. 664.[5]

Since the indictment charges a single scheme to defraud, it is immaterial that the means by which that scheme was executed may present, as petitioner contends, "two separate and dissimilar factual situations" (Pet. 21). Obviously, a single scheme to defraud may encompass dissimilar means of execution. Furthermore, the two transactions by which the single scheme here was alleged to have been carried out are related in character. Both transactions involved excess payments to

[5] For the same reasons petitioner's complaint (Pet. 10, 13–14, 22) against the trial court's charge to the jury is not well taken. The court properly instructed the jury that the indictment charged a scheme to defraud by increasing the price of the building and that the scheme was alleged to have been consummated by making an addition to the contract price and by charging for fictitious "extras" (R. 1158). The court further instructed the jury (R. 1167): "* * * I tell you that in this case the intention to defraud and the scheme to defraud must have been conceived before any of these letters or documents were mailed—in other words, it could only be a crime to make such mailings when such a scheme existed, and but for the mailing, no matter how great the scheme or how fraudulent the scheme, if nothing was ever mailed there would be no Federal jurisdiction. * * *" It must be assumed, therefore, that the jury found that the scheme to defraud existed prior to the mailings alleged in counts 1, 2 and 3, the only counts upon which petitioner was convicted.

the same contractor for work done or to be done on the same construction job.

There is no conflict between the decision below and that of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Buckner*, 108 F. (2d) 921, certiorari denied, 309 U. S. 669. The portion of the *Buckner* decision cited by petitioner (Pet. 31–34) was grounded upon the insufficiency of the evidence to show the formulation of a scheme to defraud prior to the mailings alleged in two of the counts of the indictment.[6] We do not understand that petitioner makes any such contention here.

II

By his plea of not guilty petitioner placed in issue the question of his fraudulent intent in the transactions alleged in the indictment. It was the gist of petitioner's defense that, however fraudulent may have been the conduct of Hart in connection with the construction of the building for the Louisiana Polytechnic Institute, petitioner was no more than Hart's dupe and did not enter into any scheme with Hart to defraud.

As part of its proof of petitioner's fraudulent intent, the Government was permitted to introduce evidence of other fraudulent transactions and schemes, in most of which petitioner and Hart participated and which were accomplished in a substantially similar manner (R. 640, 641). These involved construction projects at Louisiana State Normal College, Louisiana State University, and Charity Hospital at New Orleans, which is associated with Louisiana State University (R. 133, 645, 663–664, 666, 686, 727, 738–748, 748–750, 759–760, 761–762, 788–797, 816–821, 828, 831, 1079, 1081, 1096–1097, 1100–1104, 1105–1107). Another had to do with the endorsement by petitioner of a $75,000 cashier's

[6] *Hass* v. *United States*, 93 F. (2d) 427 (C. C. A. 8), also cited by petitioner (Pet. 29–31), was decided upon the same ground.

check payable to petitioner's order, which petitioner then returned to Dr. James Monroe Smith, president of Louisiana State University, thus enabling Smith to negotiate the check and thereby convert university funds (R. 1069–1075). Petitioner complains (Pet. 34–53) that this evidence of "collateral" matters was irrelevant and prejudicial. But the evidence was adduced by the Government to show that petitioner did intend to enter into a scheme with Hart to accomplish the fraud charged. Manifestly, the existence of these other frauds, in most of which Hart participated, was relevant in determining the credibility of petitioner's defense that he was simply Hart's dupe.

Such evidence of offenses similar to the offense charged is always admissible to prove intent. 2 *Wigmore,* Evidence (3rd ed., 1940), secs. 304–305; 1 *Wharton,* Criminal Evidence (11th ed., 1935), sec. 345; *Morris* v. *United States,* 112 F. (2d) 522 (C. C. A. 5), certiorari denied, 311 U. S. 653. And it is not made inadmissible because it may indicate the commission of other crimes. *Suhay* v. *United States,* 95 F. (2d) 890, 894 (C. C. A. 10), certiorari denied, 304 U. S. 580; *Moore* v. *United States,* 150 U. S. 57; *Devoe* v. *United States,* 103 F. (2d) 584 (C. C. A. 8), certiorari denied, 308 U. S. 571; *Dysart* v. *United States,* 270 Fed. 77 (C. C. A. 5), certiorari denied, 256 U. S. 694. The theory underlying the admissibility of this type of evidence is that numerous acts of a similar character, particularly when committed over a period of time, are strongly indicative of criminal intent, which can only be proved indirectly in any case. See *Samuels* v. *United States,* 232 Fed. 536 (C. C. A. 8); Coleridge, C. J., in *Regina* v. *Francis* [1874], 2 Crown Cas. 128. The testimony with respect to the $75,000 Smith check was clearly admissible for the same reason, the only explanation offered by petitioner being another claim that he had been duped by Smith as he claimed

to have been duped by Hart in the transactions charged in the indictment.[7]

That this was the rationale upon which the trial court proceeded is made clear by the judge's remarks when he permitted the evidence to be received (R. 640, 641):

> I am going to permit the Government to prove any transactions in which Mr. Weiss in connection with Mr. Monte Hart or this firm approved payments to be made to them, or fees that were paid to himself in connection with these matters, *to illustrate his intentions.*
>
> * * * * *
>
> As indicated in previous rulings in matters of this kind the Government will be allowed to prove such transactions as happened in the dealings in which Caldwell Brothers and Hart were the contractors and this defendant or his firm of architects which are of a similar

[7] The evidence with respect to this check was elicited from petitioner on cross-examination and was admitted by the trial court for its bearing upon the transactions between petitioner and Caldwell Brothers and Hart concerning the Southern Dairy Products Company (R. 1069–1070). It had previously been shown that Caldwell Brothers and Hart had given petitioner numerous checks totalling approximately $75,000, purportedly in payment for stock in the dairy company (R. 1048–1051), which was sponsored by petitioner (R. 1032, 1043–1046). The evidence indicated that this company was insolvent at the time (R. 1053–1054) and, also, that the stock certificates were not delivered to Caldwell Brothers and Hart, but were retained by petitioner (R. 1042–1043). In overruling the motion for a new trial the trial judge stated that the jury might have inferred from this evidence that the dairy company "was a mere front or sham for the purpose of covering up the receipt of these sums of money out of the sums that had been realized from this transaction. The testimony showed some of these checks, at least, passed into his [petitioner's] private bank account" (R. 1190–1191; see also R. 1066). Petitioner admitted that the first told a federal investigator that the $75,000 check was tendered to him by Smith to finance the construction of a modern plant by the dairy company (R. 1071–1072), and that he later changed his story and told the investigator that Smith tendered him the check in payment for architectural services (R. 1073–1075). In the circumstances the court below correctly held that "this so-called extraneous fraud was admissible to prove contradictory statements by Weiss himself" (R. 1261), as well as to show that Weiss was associated with Smith in perpetrating a fraud upon Louisiana State University (R. 1263).

> nature and transpired along about the same time as this transaction *as throwing light on the question of intent on the part of the defendant in his conduct in connection with the case on trial and the matters arising in the case on trial.* * * * [Italics supplied.]

Petitioner further urges that a new trial should have been granted him because he was surprised by the introduction of the $75,000 Smith check and was unable to present an adequate explanation therefor, which, he says, would have shown that the transaction was entirely innocuous (Pet. 51–53). Such a claim of unfair surprise seems particularly inappropriate since petitioner, by his plea of not guilty and his testimony in chief, had put the question of his criminal intent directly in issue and the evidence claimed to have surprised the defense was elicited from petitioner himself. The legal objection of unfair surprise is not available just because the other side does not anticipate specific evidence; the purpose of the objection is to prevent the introduction of evidence which may have been so skillfully fabricated that its spurious character cannot be detected at once. Evidence tending to show a defendant's specific intent and concerning matters leading up to and succeeding the offense charged, which is always to be anticipated, stands on a very different footing. 2 *Wigmore,* Evidence (3rd ed., 1940), sec. 305.

In any event, the remedy for unfair surprise is by motion for a new trial addressed to the discretion of the trial court. Such a motion was made in this case, but the trial court overruled it, stating (R. 1191–1192):

> Then in addition to that I do not think the point made by Mr. Wilkinson at the present time with regard to this seventy-five thousand dollar check justifies me in allowing a new trial in this case. Mr. Weiss took the stand and told his story, not only with regard to that, but with regard to every transaction mentioned in this case, how it happened, and the jury heard that

> and had the benefit of his entire explanation of it, and how it all came about. To say that the jury used that one incident in order to find the defendant guilty in this case I do not think would be true. I think it is a collateral matter that is not of such importance to this case as to justify the Court in setting aside the verdict and granting a new trial. To say that it disclosed a fraud upon which the jury acted, or disclosed a fraud sufficiently impressive to have caused the jury to find the verdict it did in this case, I do not think is true, and the motion for a new trial will be overruled.

Plainly, this conclusion reached by the trial court, in the exercise of its discretion, does not call for review by this Court.

CONCLUSION

The case was correctly decided below, there is no conflict of decisions, and no important question of law is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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No. 697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

LEON CHARLES WEISS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF PETITIONER TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION.

HUGH M. WILKINSON,
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Attorneys for Petitioner.

HAUSER PRINTING CO., INC., NEW ORLEANS

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REPLY BRIEF OF PETITIONER TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION.

May It Please the Court:

The writers of the government's brief in opposition are pleased on page 4 thereof to refer to the first contention of petitioner as "somewhat obscure." Our point may direct itself to a fundamental of justice perhaps

lost sight of in the labyrinth of long trial, but it should not be obscure to a mind intent on fair process of trial in the constitutional sense, rather than merely on the achievement of an instant conviction.

Our point is that no accused shall be tried on more than one accusation at a time; that our time-honored procedure demands a unanimous verdict by twelve jurors on a clear single issue of guilt or innocence upon each and every count of an indictment; and that this constitutional demand is not satisfied by the submission to the same jury and under the same count of an indictment of an alternative and separable double-issue of distinguishable facts, where some jurors might think the defendant guilty on one issue and other jurors on the other issue, but no twelve men might agree that defendant was guilty on any issue.

As we have endeavored at greater length to set forth in our original brief in support of our petition for a writ of review, such a mixed issue was the practical procedural effect of the trial of Leon Charles Weiss. He was accused of having done something in one year, and in the same count he was charged with doing something quite different in another year. The acts charged were different in their nature, they were performed with different people, proved by different evidence, they were dissimilar as alleged devices of fraud, there was an entire absence of proof of any continuity of conduct from incident to incident, and any person passing judgment upon defendant's conduct throughout might reasonably differ with other disinterested persons as to whether defendant acted with an improper motive on the first, or on the second occasion, or on any, or on both occasions.

Government counsel shelter themselves in this situation

of a fundamental violation of a serious constitutional procedural right by answering that this is a mail fraud case, and that a scheme to defraud may consist of component methods. They ignore the equal certainty that a general design to defraud on the part of a swindler, in connection with some long-continuing business transaction, may result in separated schemes and devices; and that whether an alleged accomplice, such as petitioner Weiss, had a guilty participation in one scheme or device, or in another scheme or device, may become a factual **alternative.** Absent **any** proof, as in this case, of a continuing guilty conduct from year to year and from separate incident to separate incident, on the part of the alleged accomplice, there is not only no legal warrant for trying him for both incidents under a single indictment count simultaneously, but to do so arbitrarily, as was done herein, gives each juror a double shot at him. In final analysis, each juror can find said defendant guilty on one crime **or** of another crime.

To give an exaggerated illustration, let us say that Hart, a contractor, was feuding with labor on this building; in 1936 he murdered workman A; in 1937 he murdered workman B; then Hart committed suicide. Weiss is charged with being an accessory, under very different conditions and by different methods, to each murder. He may have been an accessory to neither, either, or both. But to try him simultaneously for both homicides in such a way as to permit his jurors to find him guilty of one murder **or** the other murder would certainly shock the sense of justice of every criminal lawyer in the land.

Yet that is exactly what has been done in the case at bar. True, this is a mail fraud case, but is there any-

thing about the mail fraud statute which puts it beyond fundamentals of procedural justice?

The gist of a mail fraud violation is the use of the mails. But the use must be in furtherance of a fraudulent scheme or device, therefore the existence of a fraud is the essence of the offense. To plead a single mailing as in furtherance of two or more **separable** transactions alleged to be each independently fraudulent in character, particularly against an alleged accomplice to each transaction, affords every juror the plain alternative choice of finding the said accomplice guilty, in the alternative, of either one claimed fraud **or** the other claimed fraud. The Court, the counsel, the defendant himself, can never know what the jury determined he was guilty of.

Leon C. Weiss does not know today, his counsel do not know, the judge who tried him is unable to determine, whether under count 1 of his indictment the twelve jurors decided he was guilty of enlarging a contract price fraudulently (or, as he claimed, under authorization of the governor) in 1936; or whether those twelve jurors decided he was guilty of fraudulently (not inadvertently or negligently) approving Hart's final bill for extra work in 1937; or whether those twelve jurors disagreed between those two widely separated transactions, and twelve of them have never agreed that he was guilty of fraud in either transaction.

More than this, it actually happened that **all** the evidence **as to time** in the case, government proof, out of the mouth of the prosecution's witness, Seybold, demonstrated that the letter mentioned in Count 1 was mailed **between** the period of the first alleged fraudulent transaction in 1936 and the period of the second alleged fraudulent transaction in 1937. The letter antedated the second alleged fraudulent transaction (of the excessive extra

bill), yet the jury was instructed by the Trial Judge that the indictment charged a single scheme to defraud (see Vol. II, page 1158, of transcript, where Judge Dawkins very clearly impressed upon the jury that the indictment charged a single scheme to defraud by two methods, describing, firstly and secondly, those two methods, and then going on to repeatedly refer to the transaction as "one" or a "single" scheme, or in the singular).

It is true, as set out in footnote 5 at the bottom of page 5 of the brief in opposition, that government counsel attempt to recover from the adverse position their cause is placed in by the Trial Judge's description to the jury of the accusation, as being one of a single scheme to defraud, by urging that later (page 1167) the Trial Judge told the jury that "the scheme to defraud must have been conceived before any of these letters or documents were mailed...." This footnote to the brief in opposition then goes on to say: "It must be assumed, therefore, that the jury found that the scheme to defraud existed prior to the mailings alleged in Counts 1, 2 and 3, the only counts upon which petitioner was convicted." Of course such can be assumed. Let us analyse the situation: The Trial Judge told the jury that the whole affair, the transaction of May, 1936, as well as the transaction of May, 1937, was charged as one continuing scheme; he refers to it repeatedly in the singular; his attitude toward that issue before the jury, as it was in the entire case, was a tacit as well as express acceptance of the government's theory of a single continuing scheme. It was only routine for him to tell the jury the scheme must exist before the mailing; that statement does not detract from his more emphasized statements that the jury is dealing with only **one** scheme. The natural result is that (to deal with the mailing of March 3rd, 1937, in Count 1) every juror was bound to find, or at least likely to

find, that the one single scheme, so described by the Trial Judge as being charged by the indictment, originated in May, 1936, (certainly as far as Hart was concerned); that the scheme, therefore, must have been conceived (by the co-defendant Hart, at any rate) before Weiss' letter of March 3rd, 1937, was mailed; and in spite of the fact that a juror might not think that the alleged accomplice Weiss intended any fraud in the enlargement of the contract price in May, 1936, he might still conclude that Weiss was guilty of fraud in approving Hart's final bill for extras in May, 1937, and he would hold that the letter which Weiss mailed on March 3rd, 1937, **before the inflated bill for extras was even composed by Hart,** was in furtherance of the single continuing scheme described by the Trial Judge by methods "firstly" and "secondly", at the opening of the charge to the jury (Transcript, page 1158).

To put the very best possible face, from the prosecution's standpoint, on the matter of these instructions, it must be conceded that they were bound to have been highly confusing to lay jurors, involving, as the case did, two defendants, each with his own processes of thought bearing upon the question of personal intention toward fraud, and two independent and differing transactions a year apart, each claimed to have been fraudulent. We, therefore, point out that opposing counsel's resort, in the footnote at the bottom of page 5 of the brief in opposition, to the Trial Judge's routine reference to the legal necessity that the scheme to defraud must precede the mailing, does not, in the light of what the Trial Judge said in his whole charge about a single scheme (accomplished by two methods) being charged in the case, detract in the slightest from each juror's opportunity, **consistently with the whole charge,** to decide defendant's guilt **in the alternative,** that is to say, that he was guilty

of fraud in the transaction of May, 1936, or that he was guilty of fraud in the transaction of May, 1937.

Thus far, we have replied on this point to the brief in opposition, on the hypothesis that it is actually possible, under the authorities cited by the prosecution, to frame an indictment count on two different alleged methods of fraud (in a single scheme) as it was framed in the instant case. We have argued this phase of the debate out of a superabundance of caution only, because not a single authority cited by the brief in opposition, on page 5 thereof, fits the facts in hand. On pages 26, 27 and 28 of our brief in support of our petition for a certiorari, we have already demolished the argument made in the Circuit Court that those same authorities fitted this case. We have shown your Honors, and we repeat it, that each and every one of these cases relied on by the government is a case in which the indictment related to identical steps in the same fraud, and, incidentally, by the principal swindler, not an accomplice. In none of these cases would a juror reasonably have held that the accused might have been guilty of one incident, but not of another. The acts complained of were substantially inseparable links, like a metal chain, in the general fraud, as where a confidence man under the same blanket false representations sells individual shares of stock to a hundred victims. If he is false to one, he is false to all.

The difference that our opposition refuses to see, and the difference that the District Judge and Circuit Court failed to see, is that the jurors in the Weiss case were confronted with two differing, separable and distinguishable sets of facts, each relied on as fraud, and were virtually told in the instructions of the Trial Judge that it was all one scheme and that if there was any fraud, first or last, in that scheme, then any letter mailed

after the single scheme was conceived in furtherance thereof, was a crimnial act. Had this case involved two bogus stock sales of the same issue and under the same blanket representations, even though a year apart, a juror would logically answer that if one was a fraud, so was the other. But as long as there is available to a juror an alternative verdict of guilt, on two transactions sufficiently differing in character or history to afford reasonable room for men's minds to differ as to guilt or innocence between them, then by that extent is the accused unavoidably deprived of the unanimity of jury decision to which fundamental law entitled him.

Despite what government counsel say on page 6 of their brief in opposition we still think there is substantial conflict between the decision below and that of the Circuit Court of Appeals for the Second Circuit in *United States v. Buckner*, 108 F. (2d) 921. In the *Buckner* case, the Second Circuit Court pointed out the separable character of the two frauds ((1) the misuse of expense money and (2) the Philippine bonds manipulation), which the government attorneys had tried to treat as different methods in a single continuing fraud. In the case at bar, the courts below have refused to concede such a separable character of what they call two methods in a single fraudulent scheme. The issue is one of procedural doctrine or principle, and the holdings in the two cases are inconsistent.

II.

We have already very completely reviewed our second point, the admission in evidence of the $75,000.00 James Monroe Smith check, from pages 34 to 53 of our original brief in support of our petition for certiorari, and we will further impose upon the indulgence of your

Honors only to comment briefly on the second part of the brief in opposition.

There was absolutely no justification for the admission by the Trial Court of this check. It had no relation to the case on trial, or to any event in defendant's life even remotely related to a theory of "intent" or "system" evidence against him. His Honor, Judge Sibley, in the Circuit Court, unqualifiedly declared Weiss should have a new trial, because of the highly prejudicial use made of this check.

Now comes the brief in opposition and says (page 7): "But the evidence (of collateral matters) was adduced by the Government to show that petitioner did intend to enter into a scheme with Hart to accomplish the fraud charged. Manifestly, the existence of these other frauds, **in most of which Hart participated,** was relevant in determining the credibility of petitioner's defense that he was simply Hart's dupe" (Emphasis ours).

Let us emphasize that Hart had not the slightest relationship to the incident of the $75,000.00 check presented to Weiss by Smith.

More than that, as the true history of the check turned out, not even Weiss himself had any relationship to the proceeds thereof.

Rather than having received the sum of $75,000.00 from Smith, as argued to the jury by the prosecution, Smith had credited that money to his own daughter and himself on the books of Fenner & Beane; yet the defendant Weiss was deprived of the opportunity to prove to the jury such disposition of this large sum of money the District Attorney charged him in argument with getting.

But the brief in opposition quotes on pages 8 and

9 thereof from remarks in the transcript by Judge Dawkins to show that the $75,000.00 Smith check was admitted in evidence to prove "transactions in which Mr Weiss **in connection with Mr. Monte Hart** or this firm approved payments to be made to them, or fees that were paid to himself in connection with these matters" (emphasis ours) or "transactions as happened in the dealings in which **Caldwell Brothers and Hart were the contractors** and this defendant or his firm or architects which are of a similar nature" (emphasis ours).

Opposing counsel are here merely reaching for language to smoke-screen the issue, because the Smith $75,000.00 check never had, as we have already said, the slightest relationship to Monte Hart, or to Caldwell Brothers and Hart, or to any dealings by them. It was involved in a very brief incident exclusively between Smith and Weiss, unrelated to and unknown to Hart or his firm or its affairs, remote and dissimilar from anything else in the case.

Its admission was a judicial bungle made in the confusion and rush of the final night hours of a lengthly criminal trial; one that would not have occurred, we are sure, had the Trial Judge known the history of the check then as he learned it later; and one that he was reluctant to correct in the face of the burden of a re-trial, but which should be corrected in justice to the man whose liberty is at stake.

It is true, as said on page 9 of the brief in opposition, that a motion for a new trial is addressed to the discretion of the trial court; but that discretion is grossly abused when a trial court admits a highly prejudicial piece of unexpected evidence on a premise immediately thereafter found to be wholly false, and the

proof of which falsity was then beyond reach of the court and defendant, and when that trial court refuses to set the matter aright by a new trial.

It begs the question that the Trial Judge should say: "I think it is a collateral matter that is not of such importance to this case as to justify the Court in setting aside the verdict and granting a new trial" (as quoted on page 10 of the brief in opposition).

That such proof of apparent receipt by the defendant of an unjustified $75,000.00 from Smith was bound to have been of substantial prejudice against Weiss cannot be doubted. Elsewhere the trial judge said that anything connecting Weiss with Smith, later a known convict, was bound to prejudice Weiss (Transcript, page 640). If the evidence prejudiced Weiss, it does not afterwards lie in the mouth of the Trial Judge to say whether or not, in his opinion, it might have been the straw of proof which finally cracked the camel's back of an adverse verdict. In ultimate analysis the submission of that $75,000.00 check to the scrutiny of the jurors had nothing to do with the case in chief, was not fair evidence of system or intent, was substantially prejudicial, and deprived Weiss of a fair trial. The argument made from pages 6 to 10 of the brief in opposition that this check was properly admitted as intent evidence, because it related to a matter in which "Hart participated" (page 7), or a matter "in connection with Mr. Monte Hart or this firm" (page 8), or a matter "in the dealings in which Caldwell Brothers and Hart were the contractors" (page 8), is an argument fabricated out of unsuited words and quotations, an argument made for lack of a meritorious one.

Reiterating our prayer for the granting of a writ of certiorari to review the final judgment complained of,

Respectfully submitted,

HUGH M. WILKINSON,
JOHN D. LAMBERT,
Attorneys for Petitioner.

No. 697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

LEON CHARLES WEISS,

Petitioner,

versus

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a rehearing be granted of the petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit filed herein and denied on the 24th day of November, 1941.

QUESTIONS PRESENTED BY FORMER PETITION

The petition filed herein presented the following questions:

1.—The indictment (and particularly Count 1 thereof, on which petitioner has been sentenced to five years in the penitentiary) was duplicitous, in that it charged petitioner, in each count, with participation in two separable alleged frauds; that the mailing charged in Count 1 ante-dated, and could not have been in execution of, the later and subsequent alleged fraud; that in defiance of the government's only evidence as to the time of origin of the later alleged fraud, showing its subsequent conception in the mind of petitioner's alleged accomplice to have been **after** the mailing by petitioner of the letter described in Count 1, the trial judge still charged the jury that there was only one scheme to defraud involved in the case; and the confused issues of alleged fraudulent conduct before, and alleged fraudulent conduct after, the time of the mailing in Count 1 were thus left to the jury.

2.—That, under the theory of "system" or "intent" evidence, proof of collateral matters was admitted before the jury which exceeded legitimate bounds of such evidence; particularly in the case of the admission of a certain $75,000.00 check connected with Dr. James M. Smith, former president of Louisiana State University, which should not have been admitted against petitioner at all; but which, as admitted, was allowed on a false predicate of fact, assumed by the trial judge and argued by the district attorney, and immediately after the trial, by newly discovered evidence, was indisputably disclosed to have been false and erroneous; and yet a new trial to remedy this gross injustice to petitioner has been refused.

ARGUMENT

We respectfully urge upon this Court a reconsideration of the issues of this case, because we believe that the accused was not fairly tried on a proper single issue of guilt or innocence, and because highly prejudicial evidence which was later recognized to have been wholly false was permitted to go to his jury.

1.

Under the constitutional requirements of both the Constitution of the United States and the constitutions of all of the various states, it has been always required as basic elements of criminal procedure against a citizen in this nation that he should be fully and precisely informed of the cause and nature of the accusation against him, and such accusation should be tried by a jury of his fellow citizens, and, in the federal courts, his guilt must be unanimously agreed upon. Such requirements of constitutional law inevitably mean, and have been uniformly held to mean, that the accusation must embrace a single and definite charge of crime and that the necessary unanimity of the jurors in a federal court must be directed to the single offense thus charged.

Both of these cardinal principles of our organic law have been violated in the trial of petitioner, and it is difficult for us to understand why the highest tribunal in the land fails to recognize the injury which has been done to petitioner, because we are sure that if the violation of his fundamental rights was recognized prompt relief by this writ of review would be extended to him.

As we have tried to point out in our previous pleadings, Weiss was tried on a confused accusation that he had committed a fraud in one year, and in the same

count he was charged with committing a different fraud in another year, and the prosecution set a net to catch him, by alternative, for either offense by claiming that a letter written at a time mid-way between the two alleged fraudulent schemes was in execution of a single continuous scheme.

There was no proof to support a presumption of continuity or connection between the two alleged fraudulent devices, even if in a criminal case a presumption could have been resolved against the defendant rather than a showing made by affirmative proof beyond a reasonable doubt. On the contrary, rather than there existing any presumption of continuous fraudulent design against the defendant, the only evidence as to the time of the origin of the second alleged fraudulent scheme, evidence produced by the government itself, showed that said subsequent transaction had not even been conceived in the mind of the chief actor, of whom the present petitioner was only alleged to have been an accomplice, until after the letter referred to in said count of the indictment had been mailed.

We respectfully refer the court again to what has been said on this subject in our original brief in support of this application for a writ of certiorari, and in our reply brief on behalf of petitioner to the brief for the United States in opposition. We think that in what we have previously written and submitted to the court we have covered the subject clearly and logically, and have shown the error of the contrary contentions made by government counsel. These gentlemen of the opposition have relied upon a number of citations of authority which are sound law in the type of case that they relate to. The case at bar, however, is distinguishable and falls rather within the doctrine of the case of *United States vs. Buck-*

ner, 108 Fed. (2d) 921, and should be decided in accordance with the principles expounded in that decision.

A practical and unanswerable circumstance in the case at bar, demonstrating the constitutional irregularity of the manner of petitioner's trial is that even today, over a year since the verdict was rendered nobody connected with the case, judge, lawyers or defendant, is able to know what the jury actually decided, whether any or all of them found that Weiss was guilty of fraud in the matter of the raising of a contract price in the year 1936, or whether any or all of them found that he was guilty of knowingly approving an inflated bill of the contractor for extras in 1937.

It is the remarkable instance of a man tried simultaneously and alternatively on two separate and distinct sets of facts, each supposed to constitute a fraudulent scheme, and who may go to his grave without ever knowing whether all twelve of his jurors believed unanimously that he was guilty of fraud in either or both of said transactions.

2.

We have very thoroughly reviewed the history of the so-called "intent" evidence the prosecution was permitted to use in this case, and particularly the matter of the $75,000.00 check connected with Dr. James Monroe Smith, former president of Louisiana State University, which the prosecution was allowed to put in evidence before the jury. There is nothing which we can add to the facts of this matter as we have already carefully reviewed them in our previous briefs.

That any evidence tending to connect the defendant on trial with the aforesaid Dr. Smith, then serving time in the Louisiana State Penitentiary, would be highly prejudicial to the accused, was conceded by the trial judge

at an early period in the hearing; that such a showing of a connection between the two men was later allowed to be made to the jury by means of this check is a matter of record. And that the inferences drawn from the check before the jury by the district attorney, and which inferences were the basis of the court's admission into evidence of the check, were discovered immediately after the case had closed to have been completely false and erroneous, is also a matter of record.

How such a serious and undeserved prejudice of defendant's rights can be allowed to go unnoticed is as difficult for us to understand as is the failure, already commented on, to recognize the improper method of trying defendant simultaneously on allegations of two disconnected frauds. We can only call these matters again to the attention of the Supreme Court of the United States in the hope that our petition, and the supporting brief, may again be examined, and that in the great discretion which is vested in the highest tribunal in the land to protect from harmful error citizens who are charged with crime, a review of the judgment against this petitioner may still be granted.

Respectfully submitted,

HUGH M. WILKINSON,
JOHN D. LAMBERT,
Attorneys for Petitioner.

I hereby certify that the above petition for a rehearing is filed in good faith upon a real and substantial ground, and not for mere purpose of delay.

Dated, New Orleans, Louisiana, December 17th, 1941.

HUGH M. WILKINSON,
Of Counsel for Petitioner.